

(16,835.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 271.

JOHN McMULLEN, PETITIONER,

*vs.*JULIA E. HOFFMAN, EXECUTRIX OF LEE HOFFMAN,
DECEASED.ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

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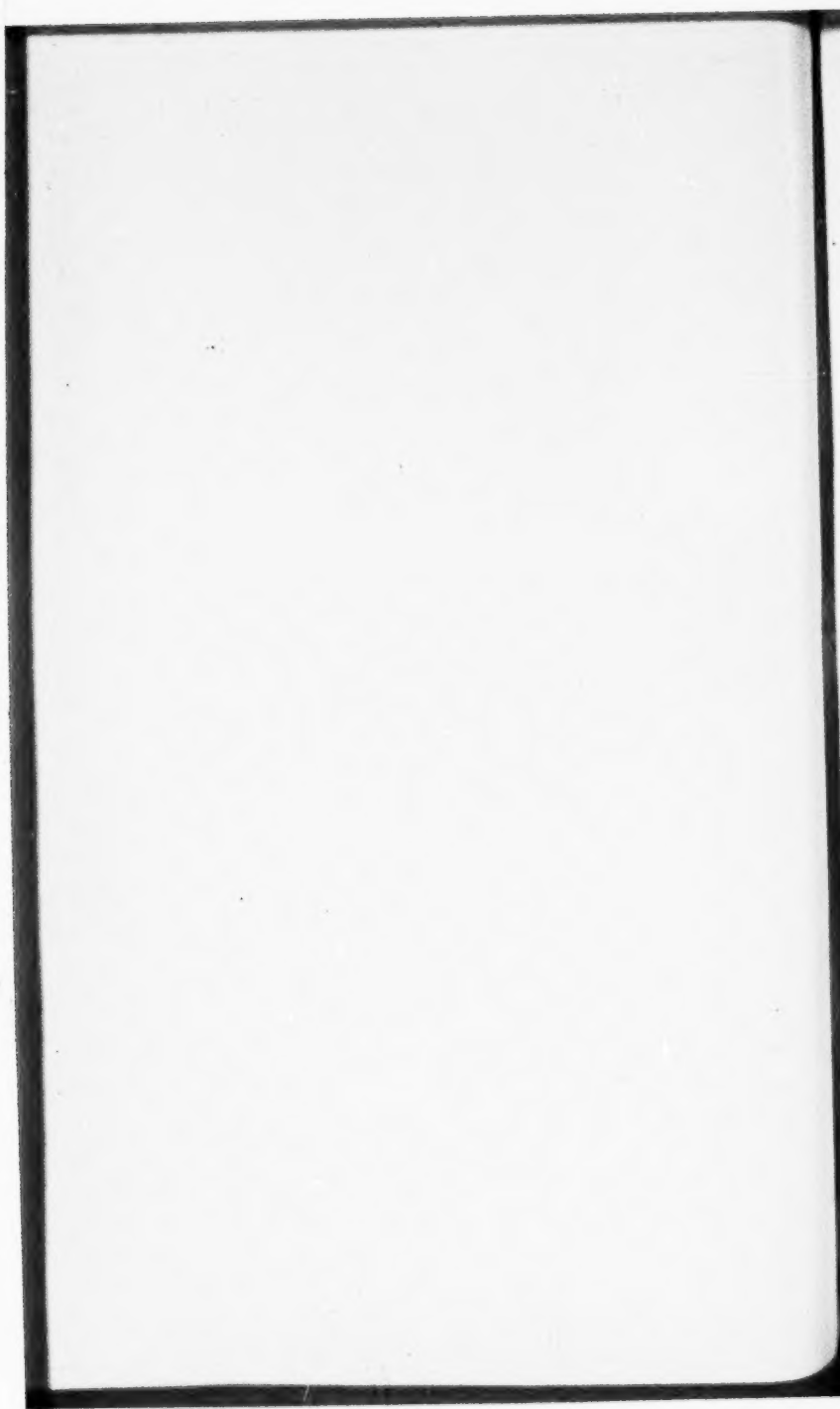
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[1] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix.

No. 2204.

Order Extending Time to Docket.

August 19, 1896.

Now, at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant herein, it is Ordered that the time, heretofore allowed by this Court, in which to file the transcript of record in this cause, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, be, and the same is hereby, extended to, and including, Monday, the fifth day of October, A. D. 1896.

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed Aug. 22, 1896. F. D. Monckton, Clerk.

²²₂₂ [2] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix.

No. 2204.

Order Extending Time to Docket.

September 29, 1896.

Now, at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant herein, it is Ordered that the time heretofore

allowed the said defendant in which to file the transcript of record in this cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended ten days.

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed Oct. 9, 1896. F. D. Monckton, Clerk.

[3]

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix.

Defendant.

Citation on Appeal.

United States of America, } s-
District of Oregon.

To John McMullen: Greeting:

Whereas, Julia E. Hoffman, Executrix, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree rendered in the Circuit Court of the United States for the District of Oregon in your favor, and has given the security required by law, you are, therefore, hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should be done to the parties in that behalf.

Given under my hand at Portland, in said District, this 4th day of August, 1896.

CHARLES B. BELLINGER,

Judge.

- [4] Due service of this citation upon me at Portland, Oregon, this 4th day of August, 1896, is hereby admitted.

L. B. COX,

Of Counsel for Complainant.

[Endorsed]: Filed August 4, 1896. J. A. Sladen, Clerk.

*In the Circuit Court of the United States for the District of
Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Last
Will of LEE HOFFMAN, Deceased,
Defendant.

Citation on Appeal.

The President of the United States, to Julia E. Hoffman, Executrix of the Last Will of Lee Hoffman, Deceased, Greeting:

- You are hereby notified that in a certain cause in equity in the Circuit Court of the United States for the District of Oregon, wherein John McMullen is complainant and Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, is defendant, the complainant therein has prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree in said cause entered, and has given the security required by law, and that such appeal has been allowed.

Wherefore, you are hereby cited and admonished to be and appear at a term of the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, within thirty days from the date hereof, to show cause, if any there be, why the decree appealed from should not be reversed and set aside, and relief be granted to said appellant as by him prayed, and as to justice and equity may appertain.

Witness, the Hon. MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 19th day of September, A. D. 1896.

CHARLES B. BELLINGER,
Judge.

Service by copy admitted at Portland, Sept. 19th, 1896.

RUFUS MALLORY,
Of Solicitor for Deft.

[Endorsed]: Filed Sept. 19, 1896. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

[6] *In the Circuit Court of the United States for the District of Oregon.*

April Term, 1895.

Be it remembered, that on the 19th day of April, 1895, there was duly filed in the Circuit Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	}
Defendant.	

Bill^{of} Complaint

To the Honorable Judges of the Above-entitled Court:

John McMullen, a citizen of the State of California, brings this, his bill of complaint, against Lee Hoffman, a citizen of the State of Oregon, and humbly complaining shows unto your

- Honors that your orator is a citizen of the State of California and a resident of the city of San Francisco, in said State, and
- [7] that the defendant, Lee Hoffman, is a citizen of the State of Oregon, and a resident of the City of Portland, in said State; and your orator complains and alleges that prior to the sixth day of March, 1893, the city of Portland, a body corporate and existing by and under the laws of said State of Oregon, acting by and through its water committee, published advertisements inviting bids for the construction of a system of waterworks for said city, or for the construction of certain portions thereof, whereby water was to be brought from a certain stream called Bull Run in the Cascade Mountains to said city of Portland and there distributed for use; that before the time named in said advertisement within which bids were to be received for the construction of said waterworks, it was agreed by and between the defendant and your orator that they would jointly endeavor to obtain the contract for the same, or some part thereof, and that in their joint interest a bid should be put in for the construction of said waterworks, or for the construction of certain portions thereof, and that in case they were successful they would share equally in such contract as resulted from their bid; that pursuant to said agreement between the defendant and your orator, and in their joint interest, a bid was put in by the defendant in the firm name of Hoffman & Bates, under which name the defendant was engaged in business, for the manufacture and laying of steel pipe from the head works of said system to Mount Tabor, which bid was found to be the lowest bid for said work, and the defendant was declared to be the successful bidder and entitled to a contract with the city of Portland therefor; and thereupon, in evidence of the interests had by the defendant and your orator in said bid, and the contract with the water committee to be entered into thereon and the work to be done thereunder, on said sixth day of March, the defendant and your orator entered into a certain written agreement under their hands and seals that they would share equally in such contract as should be entered into between the defendant and the city of Portland touching the work covered by said bid, each of them, the defendant and your orator, to furnish and
- [8]

pay one-half of the expenses of executing said contract, and each to receive one-half of the profits, or bear and pay one-half the losses which should result therefrom, and further, that in case either party to said contract should get a contract for doing, or should do, any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses of said contract or work should be shared and borne by the defendant and your orator equally.

That after the execution of said contract, to-wit, on the tenth day of March, 1893, the defendant, acting in the firm name of Hoffman & Bates, and for the joint interest of himself and your orator, entered into a certain written agreement with said city of Portland, acting by and through its water committee, based upon the bid which had been made for the work above mentioned, and being the same as that referred to in the contract between the defendant and your orator above mentioned, wherein and whereby the defendant undertook and promised to furnish all the labor and material requisite, according to certain specifications annexed to said contract and made a part thereof, for the pipe line of the system of water works from the head works at Bull Run creek to Mount Tabor, and to do and complete the manufacture of the steel pipe and other things mentioned in said specifications, to build and erect the necessary trestles, to dig the necessary ditches, to lay and cover said pipe and place it in a suitable and proper condition for operation, as contemplated by and provided in said specifications, to do all and each of the things stipulated in and required by said specifications, and to turn over all of the completed work to the city of Portland free from all liens or charges whatsoever. In consideration of the faithful performance of said contract by the defendant, the city of Portland promised to pay him therefor divers sums of money for different classes of material and labor furnished, aggregating four hundred and sixty-five thousand six hundred and sixty-seven dollars, but it was further stipulated in said contract that the city of Portland should have the right at any time during the progress of the work, and upon due notice to the defendant, to make necessary modification of the plans, specifications and locations,

and in such cases the payment to the defendant should be increased or reduced in proportion to the increase or reduction of expenses resulting from any such modification, and that payment was to be made only for work actually performed. It was further provided in the specifications attached to the said contract that the defendant should keep the conduit pipe in thorough repair, and guarantee the city against all loss, cost, or damages from breaks or leaks for a period of six months after the water should have been running under full pressure through the whole length of the conduit, and that during such [10] period he should be responsible for all damages from leaks and breaks, and made the necessary repairs at his own cost and expense, and that if he did not do so the city might make such repairs at the defendant's expense, and deduct the costs thereof from the moneys withheld. Payments were to be made upon monthly estimates of the work done to be delivered by the engineer of the water committee to the defendant, on the tenth day of each month, ninety per cent of the estimate to be paid on the twentieth day of the succeeding month, and the balance within twenty days after the due completion of the work and its acceptance by said water committee.

Your orator further shows that upon the execution of said contract the defendant and your orator proceeded with the performance of the work therein contemplated, and on or about the first day of January, 1895, completed the same and made delivery thereof to the city of Portland, which received and accepted the same, subject to the obligations imposed by said contract as to the maintenance of said conduit pipe, repairs on the same and damages from leaks and breaks, for six months after the date of such acceptance, and the city of Portland on said day turned water under full pressure into the whole length of the conduit pipe and has ever since been so running it; that towards the execution of said work your orator contributed valuable services of himself personally and of his own employees and agents in the State of California and elsewhere than in the State of Oregon, and contributed money and property for equipment in the prosecution of said work to [11] the amount of value of \$2,414.46, or thereabouts, and your orator has at all times been ready and willing to render, and has

rendered, any or all services in the conduct or management of the business of said partnership which have been requested by the defendant, and has been ready and willing to render any other service which might have been required or desired of him towards the prosecution of said work; that the defendant also contributed his personal services and advanced moneys and supplied equipment for the prosecution of said work, but the exact amount of such advances and the value of such services and equipment your orator does not know and cannot state; that your orator and the defendant did other work for bringing Bull Run water to Portland in connection with and supplementary to the work done under the contract between the defendant and the city of Portland, and for the work done under said contract the defendant has been paid by the City of Portland the stipulated amount of ninety per cent of the contract price, the other ten per cent being withheld until compliance is made with the guaranty in said contract contained as to keeping the line of pipe in repair and saving the city harmless from damages by leaks or breaks for six months from the date of the completion of the contract, and your orator is informed and believes, and therefore alleges the truth to be, that the defendant has been paid in large part, if not wholly, the cost and value of the other work performed for such water committee and above mentioned.

Your orator further alleges that he is informed and believes that various modifications were made by the city of Portland [2] in the plans, specifications and locations of said work, some increasing and some diminishing the contract price, but just what such modifications were and the extent of increase or diminution of the contract price resulting therefrom your orator does not know.

Your orator further shows to the court that at the time of the execution of the contract between your orator and the defendant above mentioned it was understood and agreed that within the State of Oregon the defendant was to have and exercise personal superintendence of the work contemplated to be done under said contract, was to make all purchases, hire all labor, and generally to manage all matters connected with the execution of said work, to draw and receive from the City

of Portland all moneys to be paid for said work, and to disburse the same for account of said work as might be required; that the defendant did assume and exercise personal superintendence of said work, and did make all purchases, except a certain hydraulic punch and shears purchased by your orator, employ all labor and exercise general management within the State of Oregon over all matters connected with the execution of said work, and received all moneys paid by the city of Portland on account of said work, and disbursed the same as far as there was occasion for disbursements, and, as your orator is informed and believes, and therefore alleges, of all the work done, material purchased, labor employed, expenses incurred and moneys paid out by the defendant he kept and now has full records and books of account; but that your orator during all the time of the prosecution of said work was a resident of the city of San Francisco, and with the exception of occasional visits to the city of Portland and with the exception of occasional visits to the city of Portland and casual inspections of the work as it progressed had no oversight of the work as it was done, and kept no book of account or record touching the same, and he alleges that he has now no knowledge or information touching the amount or character of the work performed outside of that provided for in the contract between the defendant and the city of Portland, or the value thereof, nor the character, amount or cost of materials purchased for said work, nor the amount or cost of labor therefor, nor the moneys paid to the defendant by the city of Portland for the work done under said contract, as well as that done in addition thereto, nor disbursements of such moneys made by the defendant on account of said work, but that all said matters and things are fully set forth in and shown by the records and books of account touching said work kept by the defendant; that your orator is informed and believes, and therefore alleges, that the defendant now has in his possession the several monthly estimates rendered him by the engineer of said water committee, and that the last of said estimates will show all the money earned and paid on said contract and other work done to bring Bull Run water to the city of Portland.

Your orator further alleges that on or about the 4th day of December, 1894, at the city of Portland, he requested the de-

fendant to allow him to inspect said records and books of account, and demanded of the defendant an accounting of the
[1] dealings and transactions of said partnership, but that notwithstanding his contract with the defendant touching said work and his rights as a partner therein, the defendant then refused, and has ever since refused, to render to your orator any account thereof or to allow him to inspect the records of books of account kept by the defendant touching said work, or any monthly estimate rendered the defendant by the engineer of the water committee, and notwithstanding the truth is, as your orator believes, that the moneys already paid to the defendant by the city of Portland exceed by thirty-five thousand dollars, or more, all expenditures and liabilities which the defendant has made or incurred on account of his contract with said water committee and the work done thereunder, so that the same is profit on the contract, and notwithstanding the fact, as your orator believes and alleges, that of the moneys paid to the defendant by the water committee there is a large sum, the exact amount of which is to your orator unknown, due and owing, and which ought to be now paid to your orator under his contract with the defendant, over and above all claim which the defendant may have or make thereon, the defendant has appropriated and converted all of said moneys to his own use, and has refused, and still refuses, to render your orator any account or payment thereof, though your orator has requested the same, and the defendant did on said 4th day of December deny, and still denies, the rights of your orator as a partner in said work, and his right to an equal share in the profits thereof. That to the best of your orator's knowledge, information and belief the profit made by the defendant and your orator upon the
[5] work done for the city of Portland is eighty thousand dollars, or more, of which one-half belongs and should be paid to your orator. That the assets of said partnership, in addition to said sum of thirty-five thousand dollars, or more, and ten per cent of the contract price of said work still retained and unpaid by the city of Portland, consist of certain plant, tools and other personal property in the State of Oregon, which are, according to the information and belief of your orator, of the value of five thousand dollars, or thereabouts.

Forasmuch, therefore, as the defendant has denied to your orator all his rights as a partner in the contract entered into between them as above set forth and the work done thereunder, as well as the other work done for the city of Portland, and has refused to give to your orator any information touching said contract or said work, or to allow your orator to have access to the books or records having reference to said work, and is withholding from your orator moneys paid to him by the city of Portland, and which should be now paid over to your orator under the contract between him and the defendant above set forth, it is necessary that there should be a dissolution of the co-partnership existing between the defendant and your orator in regard to said work, and inasmuch as some portion of said work is yet to be done, it is necessary that a receiver should be appointed to take charge of and to execute and complete the same under the orders and direction of this Court, so as to earn and be entitled to receive the moneys now withheld by the city of Portland on account of the work done under the contract between the defendant and said city, and to draw and receive from said city the moneys now withheld, and [16] hold and disburse the same under the orders of this Court, in order that the affairs of the partnership may be fully administered and wound up, and loss may be averted from both the defendant and your orator.

To the end, therefore, that the defendant may, if he can, show why your orator should not have the relief hereby sought, your orator prays that he may be required to make full, true, direct and particular answer and discovery to all and singular the allegations and matters set forth in this bill of complaint, but not under oath, an answer under oath being expressly waived; and that a receiver may be appointed to take charge of the records, books, papers and all other the goods and effects of said partnership, and to preserve and dispose of the same under the direction of this Court, and also to take charge of and perform all the uncompleted work under said contract with the city of Portland aforesaid, to-wit, the keeping of the conduit pipe, mentioned in said contract, in repair for so much of the period of six months from the acceptance of the work by said water committee as may yet have to run, and to do

every act and thing necessary to earn and be entitled to receive from said city of Portland, the ten per cent of the contract price of said work still unpaid, and that said receiver thereupon be authorized and directed to draw and receive from said city by and through said water committee all moneys owing from said city in respect of the work done under said contract, and as well any and all other moneys owing from said city for work done outside of said contract in order to bring Bull Run water to said city, and that he may make sale of all tools, equipment and other personal property belonging to the partnership and used in said work, and hold the proceeds thereof, and all other moneys coming into his hands, subject to the final disposition of this Court; that the defendant may be required to deposit and leave with said receiver during the pendency of this suit all books of account, papers and records he may have in his possession, withholding none of them, in anywise bearing upon said work, or the moneys paid or owing for the same, said books, papers and records to be at all seasonable times open to the inspection of your orator, his agents and legal counsel, with leave to take copies of the same; that the defendant may be enjoined and restrained during the pendency of this suit from making sale or other disposition of the tools, equipment or other personal property belonging to said partnership, and from drawing from the city of Portland the moneys by it withheld on account of the contract entered into between the defendant and the city and the work done thereunder, as well as any moneys which may be owing for other work done to bring Bull Run water to the city of Portland, or any portion of any such moneys, and that he may in like manner be enjoined and restrained from making any transfer or assignment or other disposition of said moneys, or any portion thereof, or of any claim or right he may have therein; that an account may be taken and stated between the defendant and your orator of the dealings and transactions of the partnership, and after making to the defendant due allowance for such services as he has rendered and property or money he has advanced for the work performed by himself and your orator as above set forth, and making to your orator due allowance for such services as
8] he has rendered and property or money he has advanced for

said work, the amount of profit realized on said work and the amount owing to your orator on account thereof may be ascertained and determined, and paid over to him, and that thereupon the partnership existing between the defendant and your orator may be dissolved; and that your orator may recover from the defendant his costs of suit, and may have such further or other relief as may be in keeping with equity and good conscience.

And may it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Lee Hoffman, defendant, commanding him on a day certain to appear and make answer to this bill of complaint, and to stand to, abide by and perform such order and decree in the premises as may be made.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

L. B. COX,
Of Counsel.

State of California, }
County of San Francisco. } ss.

On this 18th day of March, 1895, before me personally appeared John McMullen, the complainant above named, who, being by me duly sworn, on his oath deposes and says that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN McMULLEN.

Subscribed and sworn to before me this 18th day of March, 1895.

[Seal]

JAMES L. KING.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 19th day of April, 1895, there was issued out of said Court a subpoena ad respondendum, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

JOHN McMULLEN,	} No. 2204.
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	

Subpœna ad Respondendum.

The President of the United States of America, to Lee Hoffman, Greeting:

- [20] You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the courtroom thereof, in the city of Portland, in said District, on the first Monday of June next, which will be the third day of June, A. D. 1895, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein John McMullen is complainant, and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ of subpoena, and to have then and there the same.

Hereof fail not.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 19th day of April, in the year

of our Lord, one thousand eight hundred and ninety-five, and of the Independence of the United States, the one hundred and

[Seal]

J. A. SLADEN,
Clerk.

By G. H. Marsh,
Deputy Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

[21] The defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said Court on or before the day at which the above writ is returnable otherwise the complainant's bill therein may be taken pro confesso.

Return of Civil Process.

United States of America, }
District of Oregon. } ss.

I hereby certify that on the 19th day of April, 1895, at Portland, Or., in said district, I duly served the within subpoena ad respondendum upon the therein named Lee Hoffman, by delivering to him personally a true copy of said subpoena, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within entitled cause duly certified to by L. B. Cox, attorney for plaintiff.

H. C. GRADY,
United States Marshal.
By L. C. Driggs, Deputy.

[Endorsed]: Returned and filed April 19, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 19th day of April, 1895, there was duly filed in said court an affidavit of L. B. Cox, attorney for the complainant, in words and figures as follows, to-wit:

22] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

LEE HOFFMAN,

Defendant.

Affidavit of L. B. Cox.

United States of America, }
District of Oregon. } ss.

L. B. Cox, being duly sworn, deposes and says that he is attorney for the above-named complainant and makes this affidavit on his behalf, for the reason that said complainant is not within the District of Oregon; that the attached paper marked "A" is a copy of the contract mentioned in the complaint upon which this suit is based, which contract is now in the custody of the affiant.

L. B. COX.

Subscribed and sworn to before me this 19th day of April, 1895.

[Seal]

J. A. SLADEN,

Clerk.

By G. H. Marsh, Deputy.

"A."

[23] This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with the water committee of the city of Port-

land for doing such work, the contract having been awarded to said Hoffman and Bates on said bid:

It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom.

And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike.

Witness our hands and seals this 6th day of March A. D. 1893.

(Signed)

JOHN McMULLEN. [Seal]

(Signed)

LEE HOFFMAN. [Seal]

In presence of:

P. L. Willis. (Signed.)

R. E. Sewall. (Signed.)

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

[24]

Return of Service of Affidavit of L. B. Cox.

United States of America, }
District of Oregon. } ss.

I hereby certify that on the 19th day of April, 1895, at Portland, Oregon, in said District, I duly served the within affidavit of L. B. Cox, upon the therein-named Lee Hoffman, by delivering to him, personally, a true copy of said affidavit duly certified to by L. B. Cox, attorney for the plaintiff in the within entitled cause.

H. C. GRADY,
United States Marshal.
By L. C. Driggs, Deputy.

And afterwards, to wit, on the 19th day of April, 1895, there was duly filed in said court a motion for a restraining order, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	

Motion for Restraining Order.

To the Honorable Judges of the above-entitled court.

Comes now the complainant by counsel and based upon the
 5] verified bill of complainant and the affidavit of L. B. Cox, solicitor for the complainant filed herein, moves your Honors for an order enjoining the defendant during the pendency of this suit from the commission of the acts set forth in the bill, and that a further order may be made appointing a receiver in accordance with the allegations and prayer of the bill; and that pending such action as may be taken hereon a restraining order may issue against the defendant as prayed for in the bill.

COX, COTTON, TEAL & MINOR,
 Solicitors for Complainant.

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

Return of Service of Motion.

United States of America,	}	ss.
District of Oregon.		

I hereby certify that on the 19th day of April, 1895, at Portland, Or., in said District, I duly served the within motion for an enjoining order upon the therein named, Lee Hoffman, by delivering to him, personally, a true copy of said motion, duly certified to by L. B. Cox, attorney for the plaintiff.

H. C. GRADY,
 United States Marshal.
 By L. C. Driggs, Deputy.

And afterwards, to wit, on the 19th day of April, 1896, there was issued out of said court a restraining order, in words and figures as follows to wit:

[26] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN	}	No. 2204.
Complainant,		
vs.		
LEE HOFFMAN,		
Defendant.	}	

Order to Show Cause and Restraining Order]

Upon reading and filing the bill in the above-entitled cause, and hearing Mr. L. B. Cox, of counsel for the complainant, it is ordered, that the above-named defendant do appear before this court at the United States courtroom, in Portland, in said District, on the tenth day after service upon said defendant of a copy of a bill of complainant filed herein and of this order, if it be a court day, or else on the court day next following, at 11 o'clock, A. M., of said day, then and there to show cause, if any, why a provisional injunction should not issue and a receiver be appointed herein according to the prayer of the bill in that behalf.

And it is further ordered that upon the complainant giving to the defendant a bond, with sureties, in the sum of five thousand dollars, to be approved by the clerk of this court, conditioned to pay the said defendant whatever damages and losses, [27] not exceeding the sum of five thousand dollars, he may sustain by reason of this order, if the same be wrongful or without sufficient cause; in the meantime and until the further order of the court herein, the said defendant, his agents and servants be, and they hereby are, severally restrained from doing any of the acts complained of in said bill.

Dated April 19, 1895.

CHARLES B. BELLINGER,
Judge.

Return of Civil Process.

United States of America, }
District of Oregon. } ss.

I hereby certify that on the 19th day of April, 1895, at Portland, Or., in said District, I duly served the within restraining order upon the therein named Lee Hoffman, by delivering to him, personally, a true copy of said order duly certified to by J. A. Sladen, clerk of the U. S. Circuit Court.

H. C. GRADY,
United States Marshal,
By L. C. Driggs, Deputy.

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

And afterwards, to wit, on the 19th day of April, 1895, there was duly filed in said court, a bond on restraining order, in words and figures as follows to wit:

28] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,	}
vs.	
LEE HOFFMAN,	
	Complainant,
	Defendant.

Bond on Restraining Order.

Know All Men by These Presents:

That we, John McMullen, as principal, and J. F. Watson and H. F. McElroy, as sureties, are held and firmly bound unto Lee Hoffman, the above-named defendant, in the sum of five thousand dollars, to be paid to the said defendant, for the payment of which well and truly to be made we bind ourselves, our

heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated April 19, 1895.

Whereas, the above-named complainant has begun a suit in said court against the above-named defendant, and has applied to said court for a restraining order commanding and enjoining the said defendant to desist and refrain from the commission of certain acts in the bill complained of:

Now, therefore, the condition of this obligation is such, that if the above-named complainant shall answer and pay all damages and losses that the said defendant may sustain by reason [29] of said restraining order, if the same be wrongful or without sufficient cause, then this obligation is to be null and void, otherwise to remain in full force and virtue.

JOHN McMULLEN, [L. S.]

By L. B. Cox, his Attorney.

J. F. WATSON. [L. S.]

H. F. McELROY. [L. S.]

Signed, sealed and delivered in presence of, to signatures Watson & McElroy.

Geo. W. Hoyt.

Chas. O. Davis.

United States of America, }
District of Oregon. } ss.

I, J. F. Watson, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated therein, the sum of five thousand dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. F. WATSON.

Subscribed and sworn to before me this April 19, 1895.

[Seal]

R. W. HOYT,

Notary Public for Oregon.

0] United States of America, }
 District of Oregon. } ss.

I, H. F. McElroy, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated therein, the sum of five thousand dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

H. F. McElroy.

Subscribed and sworn to before me this April 19, 1895.

[Seal]

R. W. HOYT,

Notary Public for Oregon.

The above bond approved April 19, 1895.

J. A. SLADEN,

Clerk United States Circuit Court, District of Oregon.

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

And afterwards, to wit, on the 6th day of May, 1895, there was duly filed in said court, an affidavit of Lee Hoffman, defendant, in words and figures as follows, to wit:

1] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,
 Complainant, }

vs.

LEE HOFFMAN,
 Defendant. }

Affidavit of Lee Hoffman.

State of Oregon, }
 Multnomah County. } ss.

I, Lee Hoffman, defendant in the above-entitled suit, being first duly sworn, on oath according to law, do say:

That I signed the original writing, a copy of which, as I be-

lieve, is annexed to the affidavit of L. B. Cox, filed herein, but that no contract of partnership was thereby or in any manner entered into or in any manner formed between the complainant in said bill and this affiant, for that long before and at the time of the signing of said writing between the parties a combination had been formed and existed between the defendant and complainant for the purpose of preventing and defeating any competition in bidding for said work and the furnishing of the material necessary for the proper execution and performance of said contract, should it be awarded to either of said parties, whereby it was agreed by and between [32] them that the defendant should bid for the privilege of doing the work and furnishing the material mentioned in the bill of complaint under and in the name of Hoffman & Bates, and the complainant should bid in and under the name of the San Francisco Bridge Company, and that both the complainant and the defendant should and did know the amount of each one's bid at and before the same was filed with the Portland water committee, and that the figures in said bid should be so arranged as to afford one or the other of said parties a favorable chance of being awarded said contract. That pursuant to said agreement and combination between said parties said bids were made and filed, and that the bid put in by the complainant in the name of the San Francisco Bridge Company was raised and increased at the request and on the demand of the defendant about \$115,000, and that under said agreement between said parties about that sum and amount was added to complainant's bid, and thereby the said water committee was compelled to pay more for said material and work than they otherwise would have been required to pay, and as a part of the same agreement between said parties it was further agreed and understood by and between them that in the event the bid of either of said parties made as aforesaid should be accepted by the said water committee of the city of Portland, they, the complainant and the defendant, would share the net profits arising from the performance thereof between them. That the writing, a copy of which is annexed to Mr. Cox's affidavit as Exhibit "A," was made in furtherance of and to carry into effect said combination and agreement, and for no other purpose, as soon as the contract was awarded to Hoffman & Bates [33] by said water committee, and that by reason of said combina-

tion aforesaid between said parties, the price of said work and material was largely increased, and that by reason of said increase the contract was awarded to Hoffman & Bates at an advance of about \$45,000 more than would otherwise have been necessary for said water committee to pay; and further deponent saith not.

LEE HOFFMAN.

Subscribed and sworn to before me this 6th day of May, 1895.

[Seal]

E. E. MALLORY,
Notary Public for Oregon.

[Endorsed]: Filed May 6, 1895 J. A. Sladen, Clerk.

And afterwards, to-wit, on the 7th day of May, 1895, there was duly filed in said court an affidavit of John McMullen, complainant, in words and figures as follows, to-wit:

[34] *In the Circuit Court of the United States for the District of Oregon;*

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	}

Affidavit of John McMullen.

State of Oregon, }
Multnomah County. } ss.

I, John McMullen, being first duly sworn, say I have read the affidavit of the defendant filed herein. I deny all manner of combination or confederation with the defendant in regard to bidding for the work or material involved in this suit which had for its purpose or effect the prevention or defeat of com-

petition in bidding for said work or material, or of doing any wrong or injury to the city of Portland or its water committee, as charged in said affidavit, or otherwise. I deny that it was agreed between the defendant and myself that the defendant should put in one bid for the work and material mentioned in the bill of complaint and that I should put in another bid for said work and material, or either thereof, in the name of the San Francisco Bridge company, or otherwise, or that the figures of said bids should be so arranged as to afford one or the other of us a favorable chance of being awarded said contract, or that any other agreement was made than as is hereinafter and in the bill of complaint set forth: I admit that a bid was put in by me in the name of the San Francisco Bridge Company for said work and material, but I deny that it was put in pursuant to the alleged combination or agreement between the defendant and myself, or any combination or agreement, and I deny that said bid was raised at the request or demand of the defendant, or at all, in the sum of \$115,000, or any sum. I deny that by reason of said bid, or anything connected therewith, said water committee was compelled to pay, or did pay, more for said work or material than it otherwise would have been required to pay. I deny that as a part of said alleged agreement it was further, or at all, agreed between the defendant and myself, except as hereinafter and in said bill of complaint stated, that in the event that the bid of either the defendant or myself should be accepted by said water committee, we would share the net profits arising from said contract. I deny that the writing attached to the affidavit of L. B. Cox, filed herein and marked Exhibit "A" was made in furtherance of or to carry into effect the alleged combination or agreement as soon as the contract was awarded to Hoffman & Bates by said water committee, or at all, or was made for any other purpose than as hereinafter set forth. I deny that by reason of said alleged, or any, combination between the defendant and myself the price of said work or material was largely, or at all, increased, or that by reason of said alleged increase the contract was awarded to Hoffman & Bates at an advance of [36] about \$45,000, or any sum, more than would otherwise have been necessary for said water committee to pay.

For further answer to said affidavit, and for a full and true statement of the relations and connection existing between

the defendant and myself with regard to the matters set forth in the bill of complaint, I say that in or about the year 1887 the city of Portland advertised for bids for the construction of a system of water works, and the San Francisco Bridge Company, a corporation of which I was then and have ever since been the principal stockholder and general manager, was the successful bidder for a portion of such work; that contracts were not let, for the reason that the city failed to raise money for the work, but that seeing the success which had attended the bid of the San Francisco Bridge Company the defendant then or soon thereafter stated to me that when said work should be revived and other bids received for contracts for said work he desired to join me in submitting bids and to take a joint interest in such contracts as might be awarded upon them. That in the latter part of the year 1892 it became known that the city of Portland proposed to advertise for other bids for such work and thereupon the defendant and myself opened negotiations for entering a joint bid or bids for said work, or for portions of it; that owing to the magnitude of the work, it involving over \$1,000,000 in all, and my nonresidence I did not desire to bid for it alone, and on account of the magnitude of the work the defendant represented to me that he did not wish to bid alone, and thereupon it was generally understood and agreed that we would act jointly in submitting bids which should be for our joint benefit. That the water [37] committee of the city of Portland did advertise for sealed bids for a water system to bring water from Bull Run creek to the city of Portland, said bids to be submitted on or before the day of February, 1893; that a few days before said date I came to the city of Portland, for the purpose of counseling and acting with the defendant in the matter of submitting bids, and it was thereupon verbally agreed between us that we would submit bids for a number of the lots of work and material offered by said water committee, the defendant in the name of Hoffman & Bates, under which name he was engaged in business, and I in the name of the San Francisco Bridge Company; that in pursuance of said agreement I put in bids on six proposals connected with said system of water works, using the name of the San Francisco Bridge Company, and the de-

fendant, in the name of Hoffman & Bates, put in bids on four proposals, but that none of said bids were successful except the one for furnishing the work and material mentioned in the bill of complaint. That upon said proposal both the defendant and myself bid and there were six other bidders, eight in all; that the bid tendered by the defendant, \$465,667, was the lowest offered and was accepted and a contract awarded thereon, since performed by the defendant and myself, as is set forth in the bill of complaint. I further say that the amount of said bid was fixed and determined by myself, I insisting upon the bid the defendant proposed offering being reduced \$20,000 in amount, by which action only was the contract secured. It is true that in the name of the San Francisco Bridge Company I also put in a bid on the same proposal for the sum of [38] \$514,664, but said bid was put in well knowing that it would not be accepted, and I would in no event have put in a larger bid than defendant's if his had not been submitted; the next lowest bid was \$477,552, and by my joining in the defendant's bid and reducing it as above set forth there was saved to the city of Portland the sum of \$11,885. That I had not determined upon or fixed the amount I was willing to bid for said work and material at any time prior to agreeing with the defendant upon the amount specified in the defendant's bid, which was on the evening of the day preceding the letting of said work and materials; that the bid tendered by me in the name of the San Francisco Bridge Company was only tendered because other bidders knew I had come to Portland for the purpose of attending the letting and I put in a bid for appearance sake, the amount of which was fixed at haphazard after said agreement respecting the amount of defendant's bid. I further say that I did nothing in connection with said letting in conjunction with the defendant or otherwise, nor did the defendant, or any person on our behalf to my knowledge do anything to stifle or affect competition in the bidding for said work or materials; my sole aim was to obtain an award of the contract for said work and materials upon the joint bid of the defendant and myself made in the name of said defendant for the sum of \$465,667.

JOHN McMULLEN.

Subscribed and sworn to before me this 7th day of May, 1895.

[Seal]

J. M. LONG,
Notary Public for Oregon.

[Endorsed]: Filed May 7, 1895. J. A. Sladen, Clerk.

[39] And afterwards, to wit, on the 3d day of June, 1895, there was duly filed in said court, an answer, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

Complainant,

LEE HOFFMAN,

Defendant.

Answer to Bill of Complaint.

[40] The defendant, Lee Hoffman, answering the complainant's bill of complaint herein, admits that the complainant is a citizen of the State of California and a resident of the city of San Francisco in said state, and that the defendant, Lee Hoffman, is a citizen of the State of Oregon, and a resident of the city of Portland, in said State; and the defendant admits that prior to the 6th day of March, 1893, the city of Portland, a body corporate and existing by and under the laws of the State of Oregon, acting by and through its water committee, published advertisements inviting bids for the construction of a system of waterworks for said city or for construction of portions thereof, whereby water was to be brought from a certain stream called Bull Run, in the Cascade Mountains, to said city of Portland, and there distributed for use. And the defendant admits that before the time named in said advertisement within which bids were to be received for the construction of said waterworks, it was agreed by and between the defendant and

the complainant that they would endeavor to obtain the contract for the same or some part thereof; but denies they at any time agreed that they would jointly endeavor to obtain a contract for the same or some part thereof, but on the contrary it was agreed at said time between the complainant and this defendant that they should not act jointly in said matter, but severally, the defendant acting in the name of Hoffman & Bates and the complainant acting in the name of the San Francisco Bridge Company, a corporation organized and existing under the laws of the State of California. The defendant denies that it was agreed between complainant and the defendant that bids should be put in for the construction of said waterworks or for the construction of certain portions thereof, but on the contrary this defendant alleges the fact to be that it was mutually and secretly agreed by and between the complainant and the defendant before the bids hereafter mentioned were filed with the said water committee that the complainant should make and file with the said water committee several bids for portions of said work in the name of the said San Francisco Bridge Company, and the defendant should in like manner make and file several bids with said committee for the same portions of said work in the name of Hoffman & Bates, and that said bids should be made so as not to compete with each other, but so as to avoid it. That it was further agreed that for that purpose and to more surely effectuate the [41] object of getting a contract for said work at as high a figure as possible, and for the purpose of enhancing the profits of complainant and defendant, both the complainant and defendant before said bids were filed should examine the same and know the contents thereof, and that, pursuant to said understanding the complainant did submit to the defendant for his examination and approval the bids which he proposed to file with said committee for said work and the furnishing of material, and inlikemanner the defendant submitted to the complainant for his approval the bid which he proposed to file with said committee for said work and the furnishing of material, and the defendant disapproved of the complainant's bid, and required that the same be raised about (\$98,000) ninety-eight thousand dollars above and more than complainant proposed and intended and was about to bid for said work, which was

done, and the complainant disapproved of the defendant's bid, and required that the same be reduced about \$13,000 below what the defendant proposed and intended to bid for said work and the furnishing of material named in said bid, which was also done, and the said bids containing the new amounts secretly agreed upon by said parties were then filed with said water committee, and complainant and defendant mutually agreed to share the profits and losses in the execution and performance of said contract, and this defendant, for greater certainty, asks to refer to each and all of said bids upon the trial of this cause. And the defendant alleges that for the purpose of enhancing the profits of complainant and defendant it was further secretly agreed and understood by and between the complainant and the defendant at said time, and [42] that they so secretly combined and acted together for the purpose of apparently competing for said work and the furnishing of said material, but in fact not to do so, and for the purpose of advancing the price of said work and materials to the city of Portland over and above what it would otherwise have been required to pay for the same work and materials and of getting the contract at such advanced figures, all of which were in fact accomplished by the acceptance by the said water committee of the bid made by Hoffman & Bates.

Defendant further avers and alleges that in inviting bids for said work and materials the same was divided by said committee into distinct classes, and bidders were required to submit to said committee bids stating the amount for which they would perform the particular part of the work indicated in said bid. That in preparing bids for the materials and work afterward awarded to the defendant as hereinbefore stated complainant and defendant agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and materials required as that they should not operate as competing bids, although appearing to said committee to be so. The defendant bid in the name of Hoffman and Bates upon manufacturing and laying said pipe \$465,667, on furnishing steel plates for pipes \$359,278.80, on bridges, \$33,562.94, on headworks \$17,800. The complainant bid in the name of the San Francisco Bridge Company on manufacturing and laying

said pipe \$514,664, on steel plates for pipes \$348,781, on bridges \$31,279.07, on headworks \$16,550. The said several items of [43] said bids were arranged as stated by and between complainant and defendant, and it was understood and agreed between the same parties and a part of the scheme upon which bidding was carried on, and that in case the bid of Hoffman & Bates for manufacturing and laying the pipe should be the lowest and should be accepted by the city, and in case the bid of the San Francisco Bridge Company for furnishing the steel plates for the pipes should be the lowest bid and should be accepted by the said city, and the bid for the same work by Hoffman & Bates should be the next lowest, said complainant would decline to accept said work, and by that means induce the city to accept the higher bid of the defendant, and the same course was to be pursued with all other portions of said work upon which both of said parties bid.

And the defendant alleges that it was one of the conditions of bidding prescribed by said water committee that each bid, before the same would be considered, must be accompanied by a certified check for an amount equal to five per centum of the amount of said bid, and that both complainant and defendant accompanied each of their respective bids by a certified check equal to five per centum of the amount thereof.

And the said defendant alleges that as soon as the bid of Hoffman & Bates was accepted by the said water committee, and for the purpose of carrying into effect the said contract and understanding previously and then existing between the complainant and the defendant, on the 6th day of March, 1893, and the complainant and the defendant agreed in writing under their hands and seals to the effect that whereas the said Hoff- [44] man & Bates have with the assistance of the said McMullen, the complainant, at the recent bidding on the manufacturing and laying steel pipe from Mt. Taber to the head works of the Bull Run water system for Portland submitted the lowest bid for said work, and expects to enter into contract with said water committee of the city of Portland for doing such work, the contract having been awarded to Hoffman & Bates on said bid: It is thereby agreed in and by said writing, amongst other things, that said Hoffman, the defendant, and said McMullen, the complainant, shall and will share in said contract (with

the said water committee of the city of Portland) equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom, which written contract the defendant asks to refer to upon the trial of this cause for greater certainty. And so the defendant alleges the fact to be that each of the bids so made as aforesaid by the complainant in the name of the San Francisco Bridge Company and by the defendant in the name of Hoffman & Bates was in the joint interests of complainant and defendant, but denies that one single bid was made in their joint interests.

This defendant further answering said bill of complaint admits that pursuant to said alleged agreement between defendant and complainant, and in their joint interests, a bid was put in by the defendant in the name of Hoffman & Bates, under which name the defendant was engaged in business for the manufacture and laying of steel pipes from the head works of said system to Mt. Tabor, which bid was found to be the lowest [45] bid for said work, which is the bid of Hoffman and Bates above referred to, and admits the defendant was declared to be the successful bidder and entitled to a contract with the city of Portland therefor. And the said defendant admits that thereupon, in evidence of the alleged interests had by the defendant and the complainant in the said bid and the contract with the water committee to be entered into thereon and the work to be done thereunder on the said 6th day of March, defendant and the complainant entered into a certain written agreement under their hands and seals that they would share equally in such contract as should be entered into between the defendant and the city of Portland touching the work covered by said bid, each of them, the defendant and the complainant to furnish and pay one-half of the expense of executing said contract, and each to receive one-half of the profits or bear and pay one-half of the losses which should result therefrom, and further that in case either party to said contract should get a contract for doing or should do any other part of the work let or to be let by the said committee for bringing Bull Run water into Portland, the profits and losses of said contract or work should be shared and borne by the complainant and the defendant equally. But this defendant avers that the said contract

last referred to is the same contract referred to in a former part of this answer, and was a part of and made to aid in carrying out the unlawful combination and confederacy entered into between complainant and defendant hereinbefore more particularly and concisely stated and alleged, to which statement this defendant asks leave to particularly refer upon the trial.

- [46] And the defendant further answering the complainant's bill of complaint admits that after the execution of the said contract, to wit, on the 10th day of March, 1893, the defendant, acting in the firm name of Hoffman & Bates, and in the joint interest of himself and complainant, entered into a certain written agreement with said city of Portland, acting by and through its water committee, based upon the bid which had been made for the work above in the said bill of complaint and in this answer mentioned, and being the same as that referred to in the contract between the defendant and the complainant above-mentioned, wherein and whereby the defendant undertook and promised to furnish all the labor and material requisite according to certain specifications annexed to said contract, and made a part thereof, for the pipe line of the system of waterworks from the head works at Bull Run creek to Mount Tabor, and to do and complete the manufacture of steel pipe and other things mentioned in said specifications, to build and erect the necessary trestles, to dig the necessary ditches, to lay and cover the said pipe and place it in a suitable and proper condition for operation, as contemplated by and provided in said specifications; to do all and each of the things stipulated in and required by the said specifications, and to turn over all of the completed work to the city of Portland free from all liens or charges whatsoever. Admits that in consideration of the faithful performance of the said contract by the defendant the city of Portland promised to pay him therefor divers sums of money for different classes of material and labor furnished, aggregating four hundred and sixty-five thousand six hundred and sixty-seven dollars, and admits that it
- [47] was further stipulated in said contract that the city of Portland should have the right at any time during the progress of the work and upon due notice to defendant to make necessary modifications of the plans, specifications, and locations, and in

such cases the payment to the defendant should be increased or reduced in proportion to the increase or reduction of expenses resulting from such modification, and that payment was to be made only for work actually performed. Admits that it was further provided in the specifications attached to the said contract that the defendant should keep the conduit pipe in thorough repair, and guaranty the city against all losses, costs, or damages from breaks or leaks for a period of six months after the water should have been running under full pressure through the whole length of the conduit, and that during such period he should be responsible for all damages from leaks and breaks, and make the necessary repairs at his own cost and expense, and that if he did not do so the city might make such repairs at the defendant's expense, and deduct the costs thereof from the money withheld.

Admits that the payments were to be made only on monthly estimates of the work done to be delivered by the engineer of the water committee to the defendant on the 10th day of each month, 90 per cent of the estimate to be paid on the 20th day of the succeeding month, and the balance within twenty days after the due completion of the work and its acceptance by said water committee.

Denies that upon the execution of the said contract the defendant and the complainant proceeded with the performance of the work therein contemplated, or on or about the first day of January, 1895, or at any other time, completed the same, or any part thereof, or made delivery thereof to the city of Portland; but, on the contrary, this defendant alleges that he alone proceeded with said work and completed the same at the time stated, and turned the same over to the city of Portland, but admits that the same was accepted by the city of Portland subject to the obligations imposed by the said contract as to the maintenance of said conduit pipe, repairs on the same, and damages for leaks and breaks for six months after the date of said acceptance, and admits that the city of Portland on said day turned water under full pressure into the whole length of the conduit pipe and has ever since been so running it.

Further answering said bill of complaint the defendant denies that towards the execution of the said work the complainant contributed valuable or any services for himself, per-

sonally or otherwise, or of his own employees or agents, or any or either of them, in the state of California or elsewhere than in the State of Oregon, or in the State of Oregon or elsewhere, or contributed money or property or anything else for equipment in the prosecution of said work or otherwise to the amount or value of \$2,414.46 or thereabouts or any other sum or amount, and denies that the complainant has at all or any times been ready and willing to render, or has rendered, any or all services, or any services, whatever in the conduct or management of the business of alleged partnership which have been requested by defendant, or has been ready or willing to render any other service which might have been required or desired [49] of him towards the prosecution of said work. But, on the contrary, the defendant alleges the fact to be that as soon as the written agreement between the complainant and defendant was signed the complainant left the State of Oregon, and thereafter neglected, failed, and refused to render any aid or to assist the defendant in any way whatever in carrying out said contract with the city of Portland. That in the first place the defendant was required to give to the city of Portland a bond with sureties for a very large amount, to wit, \$140,000, for the due performance of said work, and the defendant requested the complainant to furnish a portion of the sureties on said bond, but the complainant refused to do so or to aid the defendant in any manner to procure said sureties. This defendant further avers that a large amount of money was necessary to be raised from time to time in the performance of said contract with said water committee for the purpose of purchasing material and supplies and the payment for the laborers necessarily employed in and about said work, and that the defendant was without the necessary means or resources to procure the same; that he continued to apprise the complainant from time to time up to about the 16th day of September, 1893, of his circumstances and condition financially, and requested the complaint to furnish one-half of the money actually necessary to the successful prosecution of the said work and the performance of said contract, but the defendant positively declined and refused to furnish any money whatever to aid in the prosecution of said work or the performance of said contract, claiming he had no money to put

[0] into the business. That by reason of said failure and refusal of said complainant to perform his part of the said alleged agreement of copartnership the said defendant, on or about the 16th of September, 1893, dissolved the same, and notified the complainant of such dissolution and the termination of said alleged agreement, and the said complainant thereafter assented to said dissolution, and that thereby the said supposed copartnership was dissolved and terminated.

Defendant further avers and alleges that complainant not only refused to furnish any surety in the bond required under the bid of Hoffman & Bates accepted by the city water committee to insure the performance of the contract by the bidder, and required and compelled the defendant to furnish the said bond and all the sureties thereon, and refused to furnish his proportionate share of the money required and necessary to carry on the work under said contract, and to pay the bills for labor and materials as they fell due, but complained of defendant that he would not and did not refuse to pay supply and other necessary bills of expenses incurred in carrying on said work, and recommended that instead of paying such bills the defendant should stand the creditors off, declared that defendant was very foolish to try to meet every payment promptly, said "He would stand them off for everything, or pay them 50 per cent, or whatever he could out of the estimates, and such things as supplies for camps he would not pay for six months if he did not feel like it," although the defendant had been obliged in securing supplies and labor to contract for paying [51] the same at the end of each month, as complainant well knew, yet the complainant refusing to put in his share of the money to pay these bills as aforesaid desired the defendant to disregard his contract and stand off his creditors as aforesaid. And defendant further avers and alleges that said complainant being desirous of securing other portions of the work for bringing Bull Run water to the city of Portland, and particularly that portion thereof relating to the manufacture and laying of submerged pipe for conveying water across the Willamette river, proposed in writing to defendant that they devise some means to secure the said work as against any competing bidders, and proposed to defendant that for the purpose of defeating or preventing competition for

bids for said work they "pool" the bids, and recommended to defendant that to do this they would have to let the secretary of the water committee, Frank T. Dodge, in and arrange with him so that in case any bids came without personal representatives to have him not receive them until after the letting, and then return them unopened and that said complainant and defendant would gather in everybody that is personally represented, and assuring defendant there will not be many, complainant further notified defendant that one Riffle, a bidder likely to be a competitor for said submerged pipe work, had applied to McNeal's agent here for bids on the cast iron, but assuring defendant that complainant can control McNeal's man, who, complainant informed defendant, wants to go with us, meaning complainant and defendant. Complainant also notified defendant that he, defendant, should see Smith & Watson, and see that they do not form a combination with anyone [52] else to bid on this work, but advised defendant to take them in by giving them the cast iron, and further assuring defendant of complainant's confidence that defendant can get Dodge into "our," complainant's and defendant's, camp. That McNeal, referred to by complaint, at the time of making of said proposition to defendant by complainant was engaged in the business of a cast-iron pipe founder, and was likely to become a bidder for the contract of furnishing and laying said submerged pipe, and the Smith & Watson referred to by complaint is Smith Brothers & Watson, manufacturers of iron pipe in the city of Portland, and who were likely to be competitors for the contract of furnishing and laying said submerged pipe.

Defendant further avers and alleges that on the 16th day of September, 1893, he had already advanced and expended of his own funds in carrying on said work under said contract with the city of Portland, \$15,990. That bills for said work to fall due on the 25th day of September, 1893, amounted to about \$22,500. That on the 11th day of September, 1893, defendant was notified by the said committee that it was without funds with which to pay the estimates for the completed work for the month of August, and had no assurance when money for that purpose could be obtained. That in order to be prepared to meet the payments so to fall due on the 25th day of September, defendant on his own account, by furnish-

ing his own collaterals, secured at considerable loss and sacrifice, \$14,000, which would not have been necessary or required if complainant had not refused to provide the money he promised and agreed to furnish.

That the said plant purchased by defendant at Seattle, by [3] request of complainant, was purchased from the San Francisco Bridge Company, and bills therefor were rendered by said company to Hoffman & Bates, as well as for the said hydraulic punch and shears in said bill of complaint mentioned, and that said Hoffman & Bates forwarded and tendered to said San Francisco Bridge Company, San Francisco, Cal., full and complete payment of the several sums and amounts claimed in said bills. That said San Francisco Bridge Company refused to accept the money so tendered. That said defendant has at all times since said bills were rendered been ready, able, and willing, and is now ready, able, and willing, to pay for said materials, punch and shears in full.

Denies that the defendant and the complainant did other work for bringing Bull Run water to Portland in connection with or supplementary to the work done under the contract between the defendant and the city of Portland. The defendant admits that for the work done under the said contract the defendant has been paid by the city of Portland the stipulated amount of ninety per centum of the contract price, as claimed by said committee for Portland, and the other ten per centum as claimed by said committee is withheld until compliance is made with the guaranty in said contract as to keeping the line of pipe in repair and saving the city harmless from damages by leaks or breaks for six months from the date of the completion of the said contract.

The defendant admits that he has been paid a large part of the cost and value of the other work performed for said water committee, but not wholly paid.

The defendant admits that various modifications were made [4] by the city of Portland in the plans, specifications, and locations of said work, some increasing and some diminishing the contract price, and admits just what such modifications were, and the extent of the increase or diminution of the contract price resulting therefrom the complainant does not know.

And the defendant admits that at the time of the execution of the alleged contract between the complainant and the defendant it was understood and agreed that within the State of Oregon the defendant was to have and exercise personal superintendence of the work contemplated to be done under said alleged contract, was to make all purchases, hire all labor and generally to manage all matters connected with the execution of the said work, to draw and receive from the city of Portland all moneys to be paid for said work, and to disburse the same for account of said work as might be required.

And the defendant alleges it was also further agreed at the same time between said parties that for said services to be rendered by the defendant he was to have and receive and to be paid out of the money to be drawn from the said water committee a reasonable compensation for his services, and that one thousand dollars per month is such reasonable compensation.

The defendant admits that he did assume and exercise personal superintendence of said work, and did make all purchases, except a certain hydraulic punch and shears, but denies that complainant purchased same, and avers that defendant ordered the same, which were paid for by the San Francisco Bridge Company.

[55] Admits that defendant did employ all labor and exercise general management within the State of Oregon over all matters connected with the execution of said work, and received all moneys paid by the city of Portland on account of said work, and disbursed the same as far as there was occasion for disbursement; and the defendant admits that of all the work done, material purchased, labor employed, expenses incurred and moneys paid out by the defendant he kept and now has full records and books of account.

The defendant admits that during all of the time of the prosecution of the said work the complainant was a resident of the city of San Francisco, and with the exception of occasional visits to the city of Portland and casual inspections of the work as it progressed, had no oversight of the work as it was done; but as to whether he kept no book of account or record touching the same the defendant does not know, and can neither affirm or deny the same, and leaves the complainant to make such proof of such statement as he may be able upon

the trial. The defendant says that as to whether the complainant has no knowledge or information touching the amount or character of the work performed outside of that provided for in the contract between the defendant and the city of Portland, or the value thereof or the character, amount, or cost of materials purchased for said work, or the amount or cost of labor therefor or the moneys paid to the defendant by the city of Portland for the work done under said contract, as well as that done in addition thereto, or the disbursements of such moneys made by the defendant on account of said work [56] and therefor can neither affirm or deny the same, but leaves the complainant to make such proof thereof and as to all of said matters upon the trial as he may desire or be able to offer.

But the defendant admits that all of said matters and things are fully set forth in and shown by the records and books of account touching said work kept by the defendant, as this defendant now believes.

The defendant admits that he now has in his possession the several monthly estimates rendered him by the engineer of said water committee, and denies that the last of said estimates will or does show all the money earned or paid on said contract or other work done to bring Bull Run water to the said city of Portland.

The defendant admits that on or about the 4th day of December, 1894, at the city of Portland, the complainant requested the defendant to allow him to inspect said records and books of account, and demanded of defendant an accounting of the dealings and transactions of said alleged partnership, and admits that notwithstanding said alleged contract with the defendant touching said work and his pretended rights as an alleged partner therein, the defendant then refused, and has ever since refused, to render to the complainant any account thereof, or to allow him to inspect the records or books of account kept by the defendant touching said work or any monthly estimate rendered the defendant by the engineer of the water committee. But the defendant alleges that he refused to allow such examination as he then and still believes he might lawfully, properly, and justly do for the causes and reasons hereinbefore in this answer more particularly stated.

[57] This defendant admits that the moneys already paid to him by the city of Portland exceed by \$35,000 or more all expenditures or liabilities which the defendant has made or incurred on account of his contract with said water committee or the work done thereunder and admits the same is expected profit on the contract.

This defendant denies that of the moneys paid to this defendant by the water committee there is a large or any sum under complainant's alleged contract with the defendant due or owing, or which ought to be now or at any time paid to the complainant under his said alleged contract with the defendant over or above all claim which the defendant may have to make thereon. And the defendant denies that he has converted all or any of said moneys to his own use, but he admits that he has refused, and still refuses, to render to the complainant any account or payment thereof, and admits that complainant has requested the same, and admits that on said fourth day of December the defendant did deny and still denies the assumed and alleged rights of the complainant as a partner in said work and his alleged rights to an equal or any share of the profits thereof.

This defendant denies that the profit made by the defendant and the complainant upon the work done for the city of Portland was \$80,000 or more, or any other sum, and denies that said complainant did any work for the said city of Portland, and alleges that from the time said bid of Hoffman & Bates was accepted by the Portland water committee the complainant refused to aid in any manner in said work otherwise than to request defendant to go up on the Sound for a small remnant of a plant then owned by the San Francisco Bridge [58] Company for worth of no greater value than about \$1,062.82; and denies that one-half said sum of \$80,000, or any part thereof, belongs or should be paid to the complainant.

Denies that the assets of said alleged partnership, in addition to said sum of \$35,000 or more, or any sum of ten per centum of the contract price of said work still retained and unpaid by the city of Portland, consists of certain plant, tools, or other personal property in the State of Oregon or elsewhere, and denies that the same is of the value of \$5,000.00 or any sum.

Defendant admits he has on hand a part of the plant with which he did the work for the water committee, but alleges the same is pretty well worn out and of little value, but what its value is he cannot state, for the reason he does not know.

And this defendant having now made full, true, direct, and particular answer and discovery to all and singular allegations and matters set forth in complainant's said bill of complaint, and having stated why the complainant should not have the relief therein sought, now denies that any receiver ought to be appointed to take charge of the records, books, paper, and all other goods or effects of said pretended partnership, or to preserve or dispose of the same under the direction of this Court or otherwise, or to take charge of or perform all or any of the uncompleted work under said contract with the said city of Portland, namely, the keeping of the said conduit pipe mentioned in said contract in repair for so much of the period of six months from the acceptance of said work by said water committee as it may yet have to run, or to do any or every act or thing necessary to earn or to be entitled to [59] receive from said city of Portland the ten per centum of the contract price of said work still unpaid.

And this defendant denies that the said complainant is entitled to or ought to have the relief demanded in said bill of complaint, or any part thereof, or to have any accounting or an injunction or a receiver herein.

And the said defendant having now made full answer to the said bill of complaint herein prays to be discharged with his costs and disbursements.

LEE HOFFMAN.

DOLPH, MALLORY, SIMON & STRAHAN,

Solicitors for Defendant.

State of Oregon, }
Multnomah County. } ss.

On this 29th day of May, 1895, before me personally appeared the defendant, Lee Hoffman, herein, who, being by me duly sworn, on his oath deposes and says that he has heard the foregoing answer read and knows the contents thereof, and

Julia E. Hoffman, Executrix, etc.

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that same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

LEE HOFFMAN.

Subscribed and sworn to before me this 29th day of May, 1895.

[Seal]

E. E. MALLORY,
Notary Public for Oregon.

Due service of the within answer by certified copy as provided by law is hereby admitted at Portland, Or., June 3, 1895.

COX, COTTON, TEAL & MINOR,

Of Solicitors for ———

[Endorsed]: Filed June 3, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Tuesday, the 11th day of June, 1895, the same being the 56th judicial day of the regular April term of said court. Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon

JOHN McMULLEN.

vs.

LEE HOFFMAN,

} No. 2204.

Order Vacating Restraining Order, etc.

June 11, 1895.

This cause was heard upon the order requiring the defendants to show cause why a provisional injunction should not [61] issue herein. and upon the application of the plaintiff for the appointment of a receiver herein. and was argued by Mr. L. B. Cox, of counsel for said plaintiff, and by Mr. Joseph Simon and Mr. R. S. Strahan, of counsel for said defendant: On consideration whereof, it is ordered and adjudged that said provi-

sional injunction and said application for the appointment of a receiver be, and the same are hereby, denied, and that the restraining order heretofore entered herein be, and the same is hereby, vacated, set aside, and discharged.

And afterwards, to-wit, on the 11th day of June, 1895, there was duly filed in said court, a motion for an order modifying order denying application for restraining order, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	Complainant.	}
vs.		
LEE HOFFMAN,	Defendant.	

Petition for Modification of Order.

To the Honorable Judges of the Above-entitled Court.

62] Comes now the above-named complainant by counsel and respectfully moves the Court to modify the order this day made in the above-entitled cause denying the application of complainant for the appointment of a receiver herein and denying the application for a provisional injunction restraining the defendant from the commission of the acts in the bill of complaint set forth, and discharging the restraining order heretofore allowed by the Court herein, restraining the defendant from the commission of such acts.

Now, the complainant prays your Honors to so modify the said order that a provisional injunction may issue against the defendant in this cause restraining him during the pendency of this suit from drawing from the city of Portland, Oregon, or the water committee of said city, the money owing by said city on the contract made by it with said defendant for work in bringing the Bull Run water to the city of Portland, perform-

ed by the defendant and the complainant, and other work done by the defendant and complainant in connection with the principal work covered by said contract, as said matters are set forth in the bill of complaint, and in like manner enjoining and restraining the defendant from making any transfer or other disposition of said money, or any portion thereof, or of any claim or right he may have therein, during the pendency of this suit, and that the restraining order heretofore allowed by the Court herein may be continued in force to the extent of enjoining the defendant from the commission of such acts until this matter may be fully heard and determined.

COX, COTTON, TEAL & MINOR,
Attorneys for Complainant.

[63] United States of America. } ss
District of Oregon. }

Return of Civil Process.

I hereby certify that on the 11th day of June, 1895, at Portland, Or., in said District, I duly served the within petition for modification of order upon the therein named Lee Hoffman, and by delivering to him, personally, a true copy of said petition duly certified to by L. B. Cox, of attorneys for plaintiff.

H. C. GRADY,
United States Marshal.
By I. Geo. Humphrey,
Deputy.

[Endorsed]: Filed June 11, 1895. J. A. Sladen, Clerk.

And afterward, to-wit, on Tuesday, the 11th day of June, 1895, the same being the 56th judicial day of the regular April term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge., presiding—the following proceedings were had in said case, to-wit:

[64] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,	Complainant,	}
vs.		
LEE HOFFMAN,	Defendant.	

Order to Show Cause, etc.

It having this day been ordered by the Court that the petition of the above-named complainant for the appointment of a receiver herein, and for the allowance of a provisional injunction restraining the defendant from the commission of certain acts set forth in the bill of complaint be denied, and that the restraining order heretofore allowed by the Court, whereby the defendant was enjoined from commission of said acts, be discharged, and the complainant having now filed in court an application praying that said order may be modified to the extent of allowing a provisional injunction against the defendant enjoining and restraining him during the pendency of this suit from drawing from the city of Portland, Oregon, or the water committee of said city, the moneys held by said city and owing upon the contract between the defendant and said city, as is set forth in the bill of complainant and also [65] certain moneys owing from said city for other work alleged in the bill of complainant to have been performed by the complainant and the defendant in connection with the work covered by said contract, and having been performed for the purpose of bringing Bull Run water to the city of Portland, Oregon, and from making any transfer, assignment, or other disposition of said moneys, or any part thereof:

On reading the said application and hearing, Mr. L. B. Cox, of counsel, it is ordered that the defendant show cause, if any he have, on the 17th day of June, 1895, at the opening hour of court, or as soon thereafter as counsel can be heard, why the prayer of said application should not be granted and pending such hearing it is ordered that the restraining order heretofore allowed in this cause be revived and continued to the extent of

enjoining and restraining the defendant until the further order of the Court from drawing from the city of Portland, or its water committee, any of the moneys above mentioned, and from making any transfer, assignment, or other disposition of said moneys, or any portion thereof, or any claim or right he may have therein.

And it is further ordered that the bond heretofore given by the complainant upon the allowance of said restraining order be continued in full force and effect until the hearing and determination of the application of the complainant above mentioned.

Dated this 11th day of June, 1895.

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed June 11, 1895. J. A. Sladen, Clerk.

United States of America, }
[66] District of Oregon. } ss.

I hereby certify that on the 11th day of June, 1895, at Portland, Oregon, in said District, I duly served the within order to show cause upon the therein-named Lee Hoffman, by delivering to him, personally, a true copy of said order, duly certified to by the clerk of the Circuit Court for said District.

H. C. GRADY,

United States Marshal.

By Geo. Humphrey,

Deputy.

And afterwards, to-wit, on the 13th day of June, 1895, there was duly filed in said court exceptions to the answer, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	}
Complainant.	
vs.	
LEE HOFFMAN,	
Defendant.	}

Exceptions to Answer for Impertinence.

[67] Exceptions for impertinence and scandal taken by the above-named complainant to the answer of the defendant filed herein:

The above-named complainant, John McMullen, files these, his exceptions to the subjoined passages of the answer of the defendant, Lee Hoffman, to-wit:

1. To all that portion of the answer commencing with the words "but on," on the seventh line of the second page, to and inclusive of the words "avoid it," in the sixteenth line of said page.

2. To all that portion of the answer commencing with the words "that it," in the sixteenth line of the second page, to and inclusive of the words "this cause," in the eleventh line of the third page.

3. To all that portion of the answer commencing with the words "And the," in the eleventh line of the third page, to and inclusive of the words "Hoffman & Bates," in the twenty-second line of said page.

4. To all that portion of the answer commencing with the words, "that in," in the twenty-seventh line of the third page, to and inclusive of the words "be so," in the fourth line of the fourth page.

5. To all that portion of the answer commencing with the words "on furnishing," in the fifth line of the fourth page, to and inclusive of the figures "\$17,800." in the seventh line of said page.

6. To all that portion of the answer commencing with the words "The complainant," in the seventh line of the fourth page, to and inclusive of the figures "\$16,550," in the tenth line of said page.

[68] 7. To all that portion of the answer commencing with the words "The said," in the tenth line of the fourth page, to and inclusive of the words "parties bid," in the twenty-second and twenty-third lines of said page.

8. To all that portion of the answer commencing with the words "And the," in the twenty-fourth line of the fourth page, to and inclusive of the words "amount thereof," in the thirtieth line of said page.

9. To all that portion of the answer commencing with the words "And the," in the first line of the fifth page, to and inclusive of the words "greater certainty," in the twenty-first line of said page.

10. To all that portion of the answer commencing with the words "And so," in the twenty-second line of the fifth page to and inclusive of the words "joint interests," in the twenty-sixth line of said page.

11. To all that portion of the answer commencing with the words "and was," in the twenty-fifth line of the sixth page, to and inclusive of the words "the trial," in the twenty-ninth line of said page.

12. To all that portion of the answer commencing with the words "Defendant further," in the twenty-second line of the tenth page, to and inclusive of the words "as aforesaid," in the thirteenth line of the eleventh page.

13. To all that portion of the answer commencing with the words "And defendant," in the thirteenth line of the eleventh page, to and inclusive of the words "submerged pipe," in the ninth line of the twelfth page.

[69] 14. To all that portion of the answer commencing with the words "Defendant further," in the line between lines nine and ten of the twelfth page, to and inclusive of the words "to furnish," in line sixteen of said page.

15. To all that portion of the answer commencing with the words "That the," in the line between lines sixteen and seventeen of page twelve, to and inclusive of the words "complaint mentioned," in the line between lines eighteen and nineteen of said page.

16. To all that portion of the answer commencing with the words "and that," in the line between lines eighteen and nine-

teen of the twelfth page, to and inclusive of the words "in full," in the twenty-second line of said page.

17. To all that portion of the answer commencing with the words "and denies," in the third line of the seventeenth page, to and inclusive of the figures "\$1,062.82," in the ninth line of said page.

And for ground of exception the complainant says that the matter contained in all the passages above set forth is impertinent; and complainant further excepts to the matter contained in all the passages of the answer above referred to in the paragraphs of exceptions numbered 1, 2, 3, 4, 7, 11, 12, 13, as scandalous, and alleges that it is so; and complainant prays that all such impertinent and scandalous matter may be expunged from said answer.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

L. B. COX, of Counsel.

[70] Service by copy admitted at Portland, Oregon, June 12, 1895.
DOLPH, MALLORY, SIMON & STRAHAN,
Attorneys for Defendant.

[Endorsed]: Filed June 13, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Monday, the 17th day of June, 1895, the same being the 59th judicial day of the regular April term of said court—Present, the Honorable Charles B. Bel-linger, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,)	
vs.	)	No. 2204.
LEE HOFFMAN,)	

Order.

June 17, 1895.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiff, it is ordered, that the hearing of this cause, upon

[71] the motion to modify the restraining order heretofore issued in this cause, and upon the exceptions to the answer herein, be, and the same is, hereby, set for Monday, July 1, 1895.

And afterwards, to-wit, on Saturday, the 29th day of June, 1895, the same being the 70th judicial day of the regular April term of said court—Present, the Honorable Charles B. Bellinger, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon

JOHN McMULLEN,	}	No. 2204.
vs.		
LEE HOFFMAN,		

Order.

June 29, 1895.

Now, at this day, comes Mr. L. B. Cox, of counsel for plaintiff herein, and moves the court for a continuance of the hearing of this cause upon the exceptions to the answer herein, beyond the date heretofore set for said hearing, to wit, on Wednesday, July 3, 1895, whereupon, it is ordered, that said motion be, and the same is, hereby, denied.

[72] And afterwards, to-wit, on the 1st day of July, 1895, there was duly filed in said court, exceptions to the answer, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	}	
Complainant,		
vs.		
LEE HOFFMAN,	}	
Defendant.		

Exceptions to Answer for Insufficiency.

Exceptions taken by the above-named complainant to the answer of the defendant for insufficiency.

The above-named complainant excepts to the answer of the defendant filed herein for insufficiency in the passages herein-after set forth, and thereabout shows to the court that it is charged in the bill that prior to the sixth day of March, 1893, the complainant and defendant, acting together, had submitted a bid through the defendant for doing certain work for the city of Portland, Oregon, in bringing water to said city from a certain stream called Bull Run, which bid had been accepted by said city, and the defendant, by whom said bid was offered, on behalf of himself and the complainant, was declared to be entitled to the contract with the city of Portland for all such work. That thereafter, on said sixth [73] day of March, the defendant and the complainant entered into a certain written contract that they would share equally in such contract as should be entered into between the defendant and city of Portland touching said work, each to furnish one-half of the expense of executing the contract, and to receive one-half of the profits or pay one-half of the loss which should result therefrom; and further, that in case either party to said contract should get a contract for doing, or should do, any other part of the work let, or to be let, for the city of Portland for bringing water to said city, the profits and losses of said contract or work should be shared in the same manner. That a contract was entered into between the city of Portland, acting through its water committee, and the defendant for doing the work covered by the bid which had been submitted by the defendant in the interest of himself and the complainant, and said work was thereafter performed by the complainant and defendant, and certain other work in connection with bringing Bull Run water to Portland was also performed by the complainant and defendant. That a large amount of money had been earned by the complainant and defendant in doing such work, which money was in the hands of the defendant in part, and in part was owing by the city of Portland to the defendant, and that the defendant denied complainant's interest in said contract and work, and refused to account with him for the profit made thereon, but claimed the whole profit to be his own.

That for answer to such charge, as set forth in the bill, the defendant has, amongst other things, pleaded as follows, to wit:

- [74] "And the defendant further answering the complainant's bill of complaint admits that after the execution of the said contract to wit, on the 10th day of March, 1893, the defendant, acting in the firm name of Hoffman & Bates, and in the joint interest of himself and the complainant, entered into a certain written agreement with the said city of Portland, acting by and through its water committee, based upon the bid which had been made for the work above in the said bill of complaint and in this answer mentioned, and being the same as that referred to in the contract between the defendant and the complainant above mentioned, wherein and whereby the defendant undertook and promised to furnish all the labor and material requisite according to certain specifications annexed to the said contract, and made a part thereof, for the pipe line of the system of waterworks from the head works at Bull Run creek to Mount Tabor, and to do and complete the manufacture of steel pipe and other things mentioned in said specifications, to build and erect the necessary trestles, to dig the necessary ditches, to lay and cover the said pipe, and place it in a suitable and proper condition for operation as contemplated by and provided in said specifications; to do all and each of the things stipulated in and required by said specifications, and to turn over all of the completed work to the city of Portland free from all liens or charges whatsoever. Admits that in consideration of the faithful performance of the said contract by the defendant the city of Portland promised to pay him therefor divers sums of money for different classes of material and labor furnished, aggregating four hundred and sixty-five thousand six hundred and sixty-seven dollars, and admits that it was further stipulated in said contract that the city of Portland should have the right at any time during the progress of the work, and upon due notice to the defendant, to make necessary modifications of the plans, specifications, and locations, and in such cases the payment to the defendant should be increased or reduced in proportion to the increase or reduction of expenses resulting from any such modification, and that payment was to be made only for work actually performed. Admits that it was further provided in the specifications attached to the said contract that the defendant should keep the conduit pipe in thorough repair and guarantee the city against all loss,
- [75]

costs, or damages from breaks or leaks for a period of six months after the water should have been running under full pressure through the whole length of the conduit, and that during such period he should be responsible for all damages from leaks and breaks, and make the necessary repairs at his own cost and expense, and that if he did not do so the city might make such repairs at the defendant's expense, and deduct the costs thereof from the moneys withheld.

"Admits that the payments were to be made only on monthly estimates of the work done to be delivered by the engineer of the water committee to the defendant on the 10th day of each month. 90 per cent of the estimate to be paid on the 20th day of the succeeding month, and the balance within twenty days after the due completion of the work and its acceptance by said water committee.

[76] "Denies that upon the execution of the said contract the defendant and the complainant proceeded with the performance of the work therein contemplated, or on or about the first day of January, 1895, or at any other time, completed the same, or any part thereof, or made delivery thereof to the city of Portland; but, on the contrary, this defendant alleges that he alone proceeded with said work and completed the same at the time stated, and turned the same over to the city of Portland, but admits that the same was accepted by the city of Portland subject to the obligations imposed by the said contract as to the maintenance of said conduit pipe repairs on the same and damages for leaks and breaks for six months after the date of such acceptance, and admits the city of Portland on said day turned water under full pressure into the whole length of the conduit pipe, and has ever since been so running it.

"Further answering said bill of complaint the defendant denies that toward the execution of said work the complainant contributed valuable or any services of himself, personally or otherwise, or of his own employees or agents, or any or either of them, in the State of California or elsewhere than in the State of Oregon, or in the State of Oregon, or elsewhere, or contributed money or property or anything else for equipment in the prosecution of said work or otherwise to the amount or value of \$2,214.46, or thereabouts, or any other sum or

amount; and denies that the complainant has at all or any times been ready or willing to render, or has rendered, any or all services or any services whatever, in the conduct or management of the business of alleged partnership which have been requested by defendant, or has been ready [77] or willing to render any other service which might have been required or desired of him towards the prosecution of said work. But, on the contrary, the defendant alleges the fact to be that as soon as the written agreement between the complainant and defendant was signed the complainant left the State of Oregon, and thereafter neglected, failed, and refused to render any aid or to assist the defendant in any way whatever in carrying out said contract with the city of Portland. That in the first place the defendant was required to give to the city of Portland a bond with sureties for a very large amount, to-wit, \$140,000, for the due performance of said work, and the defendant requested the complainant to furnish a portion of the sureties on said bond, but the complainant refused to do so or to aid the defendant in any manner to procure said sureties. This defendant further avers that a large amount of money was necessary to be raised from time to time in the performance of said contract with said water committee for the purpose of purchasing material and supplies and the payment for the laborers necessarily employed in and about said work, and that the defendant was without the necessary means or resources to procure the same; that he continued to apprise the complainant from time to time up to about the 16th day of September, 1893, of his circumstances and condition financially, and requested the complainant to furnish one-half of the money actually necessary to the successful prosecution of the said work and the performance of said contract, but the defendant positively declined and refused to furnish any money whatever to aid in the prosecution of said work or the performance of said contract, claiming he [78] had no money to put into the business. That by reason of said failure and refusal of said complainant to perform his part of the said alleged agreement of co-partnership the said defendant, on or about the 16th day of September, 1893, dissolved the same, and notified the complainant of such dissolution and the termination of said alleged agreement, and the said com-

plainant thereafter assented to said dissolution, and that thereby the said supposed co-partnership was dissolved and terminated."

And the complainant respectfully submits to the court that he is advised by counsel that the said answer of defendant in the matters hereinabove set forth as a response to the charges of the bill of complaint above set forth, to-wit, all that portion of the answer as herein set forth commencing on the 38th line of the third page hereof to the end of the passage quoted from said answer, is evasive and insufficient, and ought to be amended, and he humbly prays that the same may be amended accordingly.

R. PERCY WRIGHT,
COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

[Endorsed]: Filed July 1, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Monday, the 1st day of July, 1895, the same being the 71st judicial day of the regular April term of said court—Present, the Honorable Charles B. Beltinger, United States District Judge, presiding—the following proceedings were had in said case, to wit:

[79] *In the Circuit Court of the United States for the District of Oregon*

JOHN McMULLEN.

vs.

No. 2,204.

LEE HOFFMAN,

Order.

July 1, 1895.

Now, at this day, comes the plaintiff herein, by Mr. L. B. Cox and Mr. H. Percy Wright, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, whereupon it is ordered that the hearing of this cause upon the exceptions to the answer of the defendant herein be, and the same is hereby, set for Wednesday, July 3, 1895.

And afterwards, to-wit, on Monday, the 26th day of August, 1895, the same being the 120th judicial day of the regular April term of said court—Present, the Honorable Charles B. Bel-linger, United States District Judge, presiding—the following proceedings were had in said case, to-wit

[80] *In the Circuit Court of the United States for the District of Oregon*

JOHN McMULLEN,	} No. 2,204.
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	}

Order on Exceptions to Dnsver.

August 26, 1895.

This cause came on to be heard before the Court on the 3d day of July, 1895, upon exceptions filed by the complainant to the answer of the defendant for impertinence and scandal, and also for insufficiency, and was argued by counsel, and the Court, not being advised as to what order should be made, took the same under consideration until this date, and now, being fully advised, it is ordered and adjudged that the 3d, 9th, 10th, and 13th, of said exceptions be, and the same are hereby, allowed, and that all other of said exceptions be, and the same are hereby, denied.

It is further ordered that this order be entered as of the 3d day of July, 1895, with like force and effect as though the same had been actually made and entered on said day, but that the complainant shall not be prejudiced in the matter of further
[81] appearing or pleading herein by reason of the entry being made as of said 3d day of July, 1895.

And afterwards, to-wit, on the 26th day of August, 1895, there was duly filed in said court, an opinion of the Court on exceptions to the answer, in words and figures as follows, to-wit:

JOHN McMULLEN, }
vs. } No. 2,204.
LEE HOFFMAN. }

Opinion on Exceptions to Answer.

August 26, 1895.

The questions in this case for decision arise upon exceptions to the answer of Hoffman.

The suit is upon a written contract between the parties, by which they agreed to share equally in a certain contract for the construction of the Bull Run pipe line entered into between the city of Portland and the defendant.

[82] The complaint alleges that prior to March 6, 1893, the city of Portland, through its water committee, invited bids for the construction of a system of waterworks; that before the time within which bids were to be received for such work it was agreed between complainant and defendant that they would jointly endeavor to obtain contract therefor and that in their joint interest a bid should be put in for the construction of said waterworks, and that in case they were successful they would share equally in such contract as resulted from such joint bid; that in pursuance of this agreement a bid was put in in the firm name of Hoffman & Bates, under which name the defendant was doing business, for the manufacture and laying of steel pipe from the head works of the water system to Mount Tabor, which bid was found to be the lowest bid made for such work; that the contract for which such bid was made was thereupon awarded to the defendant Hoffman; that thereupon, in evidence of their agreement, complainant and the defendant entered into a written agreement that they would share equally in the expenses, profits and losses of such contract as should be entered into between the city of Portland and Hoffman & Bates in respect to the work covered by the bid referred to; that thereafter the defendant, in the name of Hoffman & Bates entered into a contract with the city of Portland for the work in question, and the complainant and defendant proceeded with said work and completed the same about January 1st, 1895; that the complainant contributed valuable services by himself personally and by his employees and agents in California and elsewhere in such work, and con-

tributed money and property for equipment therein to the amount of \$2,414.46 or thereabouts, and has at all times been ready and willing to do anything necessary and required of him in that behalf; that the complainant and defendant did other work for bringing Bull Run water to Portland in connection with and supplementary to the work done under the contract mentioned; that at the time of the execution of the contract between parties hereto it was agreed that within the State of Oregon the defendant was to have superintendence of the work, manage all matters in connection therewith, and receive from the city all payments due on account of such construction contract, and that defendant so did act and manage and received payments from the city; that the defendant refuses to account to the complainant for the profits earned under said contract, which complainant believes to amount to \$80,000, or to allow complainant to inspect the records or books of account kept by defendant touching said work.

The defendant admits that before the time for receiving bids had elapsed it was agreed between the parties in the suit that they would endeavor to obtain the contract in question, but denies that it was agreed that they would act jointly to that end, but alleges that on the contrary it was agreed between them that they should not act jointly, but severally, defendant acting in the name of Hoffman & Bates and complainant acting in the name of the San Francisco Bridge Company; "that it was mutually and secretly agreed by and between the complainant and the defendant before the bids hereafter mentioned were filed with the said water committee that the complainant should make and file with the said water committee several bids for portions of said work in the name of the said San Francisco Bridge Company, and the defendant should in like manner make and file several bids with said committee for the same portions of said work in the name of Hoffman & Bates, and that bids should be made so as not to compete with each other but so as to avoid it. That it was further agreed that for that purpose and to more surely effectuate object of getting a contract for said work at as high a figure as possible, and for the purpose of enhancing the profits of complainant and defendant, both the complainant and defendant before said bids were filed should examine the same and know the contents thereof, and that pursuant to said understanding the com-

plainant did submit to the defendant for his examination and approval the bids which he proposed to file with said committee for said work and the furnishing of material, and in like manner the defendant submitted to the complainant for his approval the bid which he proposed to file with said committee for said work and the furnishing of material, and the defendant disapproved of the complainant's bid, and required that the same be raised about (\$98,000) ninety-eight thousand dollars above and more than complainant proposed and intended, and was about to bid for said work which was done, and the complainant disapproved of the defendant's bid and required that the same be reduced about \$13,000 below what the defendant proposed and intended to bid for said work and the furnishing of material named in said bid, which was also done, and the said bids containing the new amounts secretly agreed upon by said parties were then filed with said water committee, and complainant and defendant mutually agreed to share the profits and losses in the execution and performance of said contract, and this defendant for greater certainty asks to refer to each and all of said bids upon the trial of this cause."

* * * * *

[85] "That in preparing bids for the materials and work afterwards awarded to the defendant as hereinbefore stated, complainant and defendant agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and materials required as that they should not operate as competing bids, although appearing to said committee to be so."

The answer contains, among others, the following additional averments:

"Defendant further avers and alleges that complainant not only refused to furnish any surety in the bond required under the bid of Hoffman & Bates accepted by the city water committee to insure the performance of the contract by the bidder, and required and compelled the defendant to furnish the said bond and all the sureties thereon, and refused to furnish his proportionate share of the money required and necessary to carry on the work under said contract and to pay the bills for labor and materials as they fell due, but complained of

defendant that he would not and did not refuse to pay supply and other necessary bills of expenses incurred in carrying on said work, and recommended that instead of paying such bills the defendant should stand the creditors off, declared that defendant was very foolish to try to meet every payment promptly, said 'He would stand them off for everything, or pay them 50 per cent, or whatever he could out of the estimates, and such things as supplies for camps he would not pay for six months if he did not feel like it,' although the defendant had been obliged in securing supplies and labor to contract for [86] paying the same at the end of each month, as complainant well knew, yet the complainant refusing to put in his share of the money to pay these bills as aforesaid desired the defendant to disregard his contracts and stand off his creditors as aforesaid."

* * *

"Defendant further avers and alleges that on the 16th day of September, 1893, he had already advanced and expended of his own funds in carrying on said work under said contract with the city of Portland \$15,990. That bills for said work to fall due on the 25th day of September, 1893, amounted to about \$22,500. That on the 11th day of September, 1893, defendant was notified by the said committee that it was without funds with which to pay the estimates for the completed work for the month of August and had no assurance when money for that purpose could be obtained. That in order to be prepared to meet the payments so to fall due on the 25th day of September, defendant on his own account, by furnishing his own collaterals, secured at considerable loss and sacrifice \$14,000, which would not have been necessary or required if complainant had not refused to provide the money he promised and agreed to furnish.

"That the said plant purchased by defendant at Seattle, by request of complainant, was purchased from the San Francisco Bridge Company, and bills therefor were rendered by said company to Hoffman & Bates, as well as for the said hydraulic punch and shears in said bill of complaint mentioned, and that said Hoffman & Bates forwarded and tendered to said San Francisco Bridge Company, at San Francisco, Cal., full and [87] complete payment of the several sums and amounts claimed

in said bills. That said San Francisco Bridge Company refused to accept the money so tendered. That said defendant has at all times since said bills were rendered been ready, able and willing, and is now ready, able and willing, to pay for said material, punch and shears in full."

To these several portions of the answer the complainant excepts for impertinence, on the ground that the alleged fraud in procuring the construction contract from the city of Portland is not material in a suit for profits arising upon an independent contract between the parties for the construction of the work under the contract so procured. The case mainly relied upon by complainant is that of *Brooks v. Martin*, 2 Wall. 70. That was a case of partnership to buy soldiers' claims and land warrants issued therefor, to locate lands under such warrants and sell the same. Congress, to protect the soldier from his own improvidence, had enacted that any sale or contract going to affect the title or claim to any such bounty made prior to the issue of such warrant should be null and void to all intents and purposes whatsoever. Martin, the complainant in the suit, advanced all the money used in the enterprise, to the amount of \$50,000. He trusted the business entirely to the management of his two partners, who managed it at a distance of two thousand miles from Martin's home. The business was very profitable, of which fact Martin was kept in ignorance, and he was finally induced by various fraudulent expedients to sell his interests to his partners for what the Court refers to in its opinion as "substantially nothing." [88] His share in the profits at the time was \$30,000. Upon being advised of the fraud that had been practiced upon him he brought suit to cancel the sale of his interest and for an account and division of the profits. The court decided that after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. The Court cites the case of *Sharp v. Taylor*, 2 Phillips Ch. 801, where the parties, who were British subjects, bought an American vessel, which had stranded off the port of Liverpool, res-

cued and repaired her, and put her in service between British and American ports. The ship was registered in the name of a citizen of the United States, to evade an act of Parliament which prohibited other than British ships to engage in such service under British ownership. One of the owners having refused to account to the other for profits earned, suit was brought and relief decreed. The Lord Chancellor said: "He," the complainant "is not seeking compensation and payment for an illegal voyage; that matter was disposed of when Taylor received the money, and the plaintiff is now only seeking payment for his share of the realized profits. The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due, but, at most, an invasion of a parliamentary provision, supposed to be beneficial to the ship-owners of this country; an evil, if any, which must remain the same whether the freight be divided between Sharp and [89] Taylor according to their shares or remain altogether in the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defense by one against the clear title of the other?"

In *Planter's Bank v. Union Bank*, 16 Wall, 483, it was held that an action would lie for the recovery of the proceeds of sale of confederate bonds, which had been sold by the defendant on the account of the plaintiff.

Assuming that a contract for the sale of such bonds was unlawful, the Court held that when the illegal transaction had been consummated and the proceeds of sale had been actually received and carried to the credit of the plaintiffs, such proceeds may be a legal consideration between the parties for a promise, express or implied."

The doctrine thus laid down is applied in *Burke v. Flood*, 1 Fed. R., 541; in *Telegraph Co. v. Railway Co.*, 3 Id., 423; in *Wann v. Kelly*, 5 Id., 584, and in *Buchanan v. Bank*, 55 Id., 223.

The first of these cases involved the Bonanza mine owners Flood, O'Brien, Mackey and Fair, and related to the manipulation of corporations controlled by them for the benefit of themselves as partners. The Court said: "I take it there can be no doubt that a partner is entitled to contribution from his co-partner when he has paid more than his share of the firm

liabilities, even though the liabilities grow out of a tortious act of the firm.

[90] When money has come into the hands of a partnership, on a partnership transaction, however wrongfully or unlawfully acquired as between the members, it is partnership assets, and must be accounted for as such between themselves." The case was not tried upon its merits, but was disposed of on a question of parties. It did not necessarily involve actual fraud or moral delinquency. As to this the opinion is as follows: "As now presented, no answer ever having been filed, the matter rests upon naked allegations upon information and belief. It is impossible to anticipate what may turn out in the proofs. It may possibly turn out in some legal aspects of the case, that defendants may be adjudged to account, whether rightfully or not, under circumstances disclosing no actual fraud, and no moral delinquency at all. In such a case a right to contribution would certainly arise in favor of the party who is called upon to pay more than his share, even though there is no partnership between them."

In the second case, *Telegraph Co. v. Railway Co.*, the question was raised as to the right to transfer a franchise to build and operate a telegraph line on the right of way of the railway company. The court held that even if it assumed "that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the Court will not refuse to deal with that property on the ground that it was acquired under an illegal contract."

The case of *Wann v. Kelly* involved a stock gambling transaction. It is held that although the business was contrary to public policy and illegal, when the business was closed and one of the partners had received the profits, he was in duty bound to pay over to the other party his part of it.

[91] The case of *Buchanan v. Bank* was a case of partnership to pasture cattle in the Cherokee country, without contract with the Cherokee nation or authority of Congress. The partners borrowed \$25,000 to carry on this unauthorized business and gave their note for it. Upon maturity of this note they gave two others of \$12,500 each to pay the first, and upon suit being brought on one of these notes, defended on the ground that the first note provided means for an illegal transaction,

and was therefore for an illegal consideration, and that the second notes, given for the first, inherited its vice. This defense, it goes without saying failed.

The doctrine of these cases applies in all cases where recovery is sought on account of contracts that are forbidden by law, or, in case of corporation contracts, that are *ultra vires*. While such contracts will not be enforced, yet if they have been executed the party having their benefits must fulfill their own obligations in consequence of them. In none of the cases cited was there actual fraud or other moral delinquency. The profits derived from the purchase and location of soldiers' warrants in *Brooks v. Martin*, 2 Wall, 70, do not appear to have been at the expense or to the injury of the soldiers from whom the warrants were purchased. So far as appears such warrants may have been paid for at their full value and under circumstances that were advantageous to those selling them. The policy of the law forbade such dealing in order wholly to guard the soldiers from their own improvidence.

[92] So in the case of *Sharp v. Taylor*, the policy of the law prohibited British owners from using other than British ships in the particular trade in question. "The violation of law suggested in the case was not," said the Lord Chancellor, "any fraud upon the revenue, or omission to pay what might be due, but, at most, an invasion of a parliamentary provision supposed to be beneficial to ship owners of the country."

In none of the cases did the right to be enforced depend upon considerations that appeared to be immoral or wrong in themselves. While the statement in the opinion in *Burke v. Flood* that a partner is entitled to contribution where he has paid more than his share, even though the liability grows out of a tortious act of the firm, seems broad enough to authorize the conclusion that the profits of an immoral completed transaction may be recovered, yet there was no such question in the case, and the matter is freed from doubt both as to the facts of the case in this respect and the conclusion to be drawn from the opinion by the statement of the Court, that "it may possibly turn out in some legal aspects of the case, that defendant's may be adjudged to account, whether rightfully or not, under circumstances disclosing no actual fraud and no moral delinquency at all." "In such a case," says the court, "a right to contribution would certainly arise."

In *Watson v. Murray*, 23 N. J. Eq., the Court recognizes the distinction that exists between enforcing the execution of an agreement to do an illegal act and the distribution of the realized profits of the act, but held that the distinction is not to be regarded as of universal or general application, and that such distinction is excluded in cases of attempted apportionment of gains resulting from criminal practices by manifest considerations of example and influence—considerations not deemed to exist in the cases where the distinction has been allowed. These considerations necessarily exist in all cases of actual fraud or other moral delinquency. The judicial sanction given to fraudulent acts in the apportionment of the realized profits therefrom among the guilty parties, would be destructive of private and public morals. The profits of fraud belong in the same category with those of gambling and other immoral practices.

But whether or not there is a distinction between cases where the contract in question is intrinsically fraudulent and bad, and cases where its illegality is merely in the prohibition of the statute, the question upon which this case depends may be disposed of on the ground upon which it is placed by the plaintiff; namely, that where the illegal contract has been fully executed, a party is entitled to a remedy to recover his share of the profits arising from it.

In this case the profits sought to be recovered do not grow out of the contract in suit. The plaintiff was not a party to the contract for the construction of the city waterworks, and admittedly had no interest in that contract except such as he may be entitled to under the contract upon which suit is brought. There was no privity between him and the city water committee. On the contract he represented himself by his bid as against the bid of defendant, and as adverse to the interests of the defendant in the proposed contract. He assumed no obligation in the executed contract. The right which he asserts does not in any way depend upon that contract, to which he was not a party, and in which he was in no wise obligated. It is not, therefore, a case of an executed contract, legal or otherwise, under which complainant's rights in suit have arisen. The right claimed in this suit is under, not the executed contract between the defendant and the city of Portland to build the city pipe line, but the un-

executed agreement between the parties for a division of the profits of the contract. In all the cases cited by plaintiff the courts have refused to permit the defense of illegality of the contracts involved to avail, because such contracts were executed. The courts in granting relief were therefore not required to aid illegal transactions, but merely enforced rights which rested upon new and independent considerations. In *Brooks v. Martin* the contract had become executed. The illegal transaction was an accomplished fact, and would "not be in any manner affected" by what the Court was asked to do between the parties. In decreeing the relief prayed for in that case the Court did not in any manner aid the illegal business or further what the violated statute was intended to prevent. It did not enforce any provision of the illegal contract. It merely enforced the payment of money which had accrued in the hands of one of the parties to the benefit of the other as a result of the execution of the contract in question.

The contract under which the profits in this case were realized was not to do an illegal act. The case does not depend upon the city contract, but upon an alleged unlawful agreement for a division of the profits of such contract. The contract on which the profits were realized has been executed, but the express agreement by which these profits were to be ap-
[95] portioned—the agreement in suit—has not been executed; otherwise the occasion for this suit would not exist.

The case is within the principle adopted in *Meguire v. Corwine*, 101 U. S. 108. There was a contract by which one party was to procure the appointment of another as special counsel in certain cases against the United States and aid the appointee in the defense of such causes, in consideration of which he was to receive one-half of the fee paid by the government for the services rendered. The appointment was procured and the services rendered as stipulated, and the defendant received \$29,950 as a fee, but refused to account to plaintiff for any part of it. It was held that the plaintiff could not recover. The Court said: "The law touching contracts like the one here in question has been often considered by this Court, and is well settled by our adjudications. (*Marshall v. Railroad Co.*, 16 Howard, 314; *Tool Company v. Norris*, 2 Wall, 45; *Trist v. Child*, 21 Id., 441; *Coppell v. Hall*, 7 Id.,

542.) It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new supprt. They do not need it. Frauds of this class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. * * * The contract is clearly illegal, and this action was brought to enforce it."

6] In the case of *Trist v. Child*, cited above, the action was for a percentage of a claim collected from the government through the efforts of plaintiff as a lobbyist under an agreement by which he was to receive such percentage. Included in the contract there were services rendered "in drafting a petition setting forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced." But because these meritorious services were "blended and confused" with those which were forbidden, the entire contract was held to be fatally affected, and relief was refused.

In *Buck v. Albee*, 62 Am. Dec. 564, the Court held that a contract connected with and growing immediately out of an illegal act would not be enforced; that whenever it is necessary for the plaintiff to prove such illegal contract in order to recover, no recovery can be had; otherwise if the right can be established without such proof.

The case of *Hannah v. Fife*, 27 Mich., 171, lays down a principle that is decisive of this case. This was a case where the party to whom a contract was awarded for the construction of a swamp land state road entered into a contract with his competitor, by which the latter took the contract upon terms somewhat more favorable for the public than the bid upon which the award was made, and agreed to pay the successful bidder eight sections of land as a bonus for the relinquishment of his bid. The law allowed two sections of land per mile of road as the maximum quantity for the work. Each of the two bids

- was for this amount. The bid, however, of the unsuccessful bidder, who subsequently took the contract by agreement as stated, was for a roadbed only sixteen feet wide, while the State requirements were for one twenty feet wide. The Court said that there was no evidence of a previous agreement between the parties except such inferences as may be drawn from the circumstances and the contracts made; and that it was "difficult to resist the conclusion that these things tend pretty strongly to show the existence of some such previous understanding" but the Court held that whether there was in fact any such secret understanding was immaterial; that, without such understanding, the tendency of all such contracts between bidders as that in existence in the case "must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder"; that it was "this tendency rather than the fact of actual fraud in the particular transaction which is generally recognized as rendering contracts void as against public policy," and that the contract sued upon must be held void upon this ground. The doctrine of the case, in short, is that secret agreements between bidders for their mutual profit, and to avoid competition with each other while keeping up the appearance of competition, and all agreements having that tendency, are void, and will not be enforced; nor will an agreement between different sets of bidders for a public contract, by which one agrees, in consideration of a sum of money to be paid by the other, to withdraw his bid and assist the latter to obtain the contract, be enforced. (Sharp v. Wright, 35 Bart., 236; Gulick v. Ward, 18 Am. Dec., 389.)

As has already been stated, any relief decreed the plaintiff requires the enforcement of the unexecuted provisions of the contract by which plaintiff was to share with the defendant the profits of the work on the contract awarded Hoffman in the name of Hoffman & Bates. What was that contract? Plaintiff insists that the Court cannot look beyond the written agreement set out in the complaint. The written contract is to share equally in the expenses and profits of any contract that should be entered into between the defendant

and the city on an award already made the defendant as the lowest bidder for such work. The complaint alleges an agreement between plaintiff and defendant anterior to the bid, by which in effect the plaintiff should have a joint interest with the defendant in the latter's bid, and that the written contract was in evidence of this agreement. The averments of the answer refer to this identical agreement and allege considerations embodied in it to show its illegal and fraudulent character. In other words, the answer impeaches the precise transaction alleged in the complaint as the ground of plaintiff's right.

The contract thus shown is indefensible. It was a secret contract by which the parties were to pretend to be competitors for the work to be let, while in fact they were not so. The bids were for four classes or items of work, and were so arranged between the parties beforehand that the bid of plaintiff was lower than defendant's bid as to three of such items, while the defendant's bid was so far below that of plaintiff as to the remaining single item as to make the aggregate of his bid \$35,000, in round numbers, less than that of plaintiff. It is alleged that plaintiff was prepared to bid, and but for the secret agreement would have bid for such work at a figure some forty thousand dollars less than that at which the contract was let. As to this, it is argued in plaintiff's behalf that he was under no obligation to bid upon said work, and might refrain from doing so at his option. But when he seeks to recover for withholding such bid, it is another matter. The tendency of such a recovery will be to encourage combinations among bidders, destroy competition, defeat the object the legislature had in view in requiring such work to be awarded upon bids, and greatly increase the public burdens. If there was nothing more in the case than an agreement not to bid, there could be no recovery under the contract based upon such a consideration. But when the parties presented themselves as competitors for the work they were guilty of a fraud; the tendency of what was thus done was to cause the water committee to believe that the bid of defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee, that in plaintiff's opinion the work could not be profitably done for less than a figure \$35,000 higher than that bid by defendant,

although as a matter of fact plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it for an amount \$75,000 less than that at which the contract was let.

Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case.

[100] It is not necessary to discuss the minor questions raised by the exceptions to parts of the answer.

The third, ninth, tenth and thirteenth exceptions for impertinence and scandal are allowed. All other exceptions are overruled.

(Signed)

CHARLES B. BELLINGER.

Judge.

Dated August 26, 1895.

[Endorsed]: Filed August 26, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 26th day of August, 1895, there was duly filed in said court, a bill of revivor, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, as Executrix of the
Last Will and Testament of Lee Hoffman,
Deceased,

Defendant.

Bill of Revivor.

To the Honorable Judges of the above-entitled Court.

[101] John McMullen, a citizen of the State of California, and a resident of the city of San Francisco, in said State, brings this his bill of revivor against Julia E. Hoffman, as executrix of the

last will and testament of Lee Hoffman, deceased, a citizen of the State of Oregon, and a resident of the city of Portland, in said State, and thereupon your orator complains and alleges:

That on or about the 19th day of April, 1895, your orator filed a bill in equity in this court against Lee Hoffman claiming an accounting with said Hoffman of certain partnership transactions in said bill of complaint set forth.

That upon the filing of said bill of complaint a writ of subpoena was duly issued and served upon the said Lee Hoffman, the defendant in said suit, and he thereafter duly appeared by counsel and made answer to said bill of complaint, to which answer exceptions for inpertinence and for insufficiency were duly taken and filed by the complainant, and the same were argued and submitted to this Honorable Court on the 3rd day of July, 1895; that, thereafter, to-wit, on the 21st day of July, 1895, the said Lee Hoffman died, leaving a last will and testament, wherein the above-named Julia E. Hoffman was named as executrix, which will was on the 26th day of July, 1895, duly admitted to probate in the county court of Multnomah County, State of Oregon, having jurisdiction thereof, and an order was on said day made duly appointing the said Julia E. Hoffman as executrix of said will, whereupon on said day she qualified as such, and letters testamentary were duly issued to her out of said court, and she is now the duly appointed, qualified and acting executrix of the last will and testament of said Lee Hoffman, deceased.

That your orator is informed and believes, and therefore alleges, that said executrix has assets belonging to the estate of said Lee Hoffman, deceased, in her possession to the amount and value of \$30,000 or thereabouts.

Wherefore your orator prays that the said cause may be revived by the decree of this Honorable Court, and that it may proceed to a decree in his favor in accordance with the prayer of the original bill of complaint herein.

Your orator further prays that a writ of subpoena may issue in due form of law directed to the above-named defendant, Julia E. Hoffman, as executrix of the last will and testament of Lee Hoffman, deceased, requiring her to appear and show cause, if any she has, why this cause should not be revived, and requiring her to make answer to this bill of revival, but not under oath, an answer under oath being waived.

as to what assets there may be in her possession as executrix of the last will and testament of Lee Hoffman, deceased, and if no cause shall be shown by said defendant why said suit should not be revived, that a decree be entered reviving said suit in favor of your orator, and that in case said defendant shall not in her answer make admission that she has in her possession assets of the estate of Lee Hoffman, deceased, sufficient to cover and respond to the demands and requirements made by your orator in his original bill of complaint filed herein, that an account of the estate of said Lee Hoffman, deceased, may be taken by this Honorable Court and the amount of assets belonging thereto applicable to the demands of your orator as set forth in his original bill of complaint may be ascertained and determined. And your orator will ever pray, etc.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

L. B. Cox, Of Counsel.

State of Oregon. }
Multnomah County. } ss.

John McMullen, being duly sworn, says that he knows the contents of the foregoing bill of revivor; that the matters therein set forth of his own knowledge are true, and those therein set forth on information and belief he believes to be true.

JOHN McMULLEN,

Subscribed and sworn to before me this 21st day of August, 1895.

[Seal]

W. E. MITCHELL,
Notary Public for Oregon.

[Endorsed]: Filed August 26, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 26th day of August, 1895, there was issued out of said court a subpoena ad respondendum, in words and figures as follows, to wit:

[104] *In the Circuit Court of the United States for the District of Oregon.*

IN EQUITY.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, as Executrix of the
Last Will and Testament of Lee Hoffman,
Deceased,

Defendant.

No. 2,204.

Subpœna ad Respondendum.

The President of the United States of America, to Julia E. Hoffman, as executrix of the last will and testament of Lee Hoffman, deceased, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of October next, which will be the 7th day of October A. D. 1895, to answer the exigency of a bill of revivor exhibited and filed against you in our said court, wherein John McMullen is complainant, and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

[105] And this is to command you the marshal of said district, or your deputy, to make due service of this our writ of subpoena and to have then and there the same.

Hereof fail not.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 26th day of August, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and

[Seal]

J. A. SLADEN,

Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

[Endorsed]: Returned and filed August 27, 1895. J. A. Sladen, Clerk.

Return of Civil Process.

United States of America, }
District of Oregon. } ss.

[106] I hereby certify that on the 26th day of August, 1895, at Portland, in said district, I duly served the within subpoena ad respondendum upon the therein named Julia E. Hoffman, as executrix of the last will and testament of Lee Hoffman, deceased, by delivering to her, personally, a true copy of said subpoena ad respondendum, duly certified to by me as U. S. marshal, together with a copy of the bill of revivor, in the within entitled cause, duly certified to by L. B. Cox, of counsel for plaintiff.

H. C. GRADY,
United States Marshal.
By Geo. Humphrey,
Deputy.

And afterwards, to-wit, on the 4th day of September, 1895, there was duly filed in said court exceptions to bill of revivor, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the
Last Will and Testament of Lee Hoffman.
Deceased,

Defendant.

Exceptions to Bill of Revivor.

Exceptions taken by the above-named defendant to the bill of revivor filed herein:

[107] First Exception.—To that portion of said bill commencing with the words "That your orator," on line 7 of page 1 of said bill, and extending to and including the words "\$300,000 or thereabouts," on the fourteenth line of the same page, for the reason that the same is impertinent.

Second Exception.—Begin at the words "And requiring her to make answer," on the nineteenth line of the second page of said bill, and extending to and including the words "Lee Hoffman, deceased," on the 22nd line of the same page, for the reason that the same is impertinent.

Third Exception.—Begin at the words "And in that case," on the 25th line of the second page of said bill, and extending to and including the words "and determined," on the first line of the third page thereof, for the reason that same is impertinent.

DOLPH, MALLORY & SIMON,
Solicitors for Defendant.

Due service of the within exceptions by certified copy, as provided by law, is hereby admitted at Portland, Oregon, September, 1895.

COX, COTTON, TEAL & MINOR,
Attorneys for Complainant.

[Endorsed]: Filed September 4. 1895. J. A. Sladen, Clerk.

[108] And afterwards, to-wit, on Thursday, the 5th day of September, 1894, the same being the 129th Judicial day of the regular April term of said court—Present, the Honorable Charles B. Bellinger, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

LEE HOFFMAN.

} No. 2204.

Order.

September 5, 1895.

Now, at this day, on motion of Mr. L. B. Cox, it is ordered that the hearing of this cause upon the exceptions of the defendant to the bill of revivor herein be, and the same is hereby, set for to-morrow, Friday, September 6, 1895.

And afterwards, to-wit, on Friday, the 6th day of September, 1895, the same being the 130th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to-wit:

[109] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

vs.

LEE HOFFMAN.

} No. 2204.

Order Overruling Exceptions to Bill of Revivor.

September 6, 1895.

Now, at this day, comes the plaintiff herein, by Mr. L. B. Cox, of the counsel, and the defendant by Mr. Rufus Mallory,

of counsel, and thereupon, this cause comes on to be heard upon the exceptions of the said defendant to the bill of revivor herein and was argued by counsel; whereupon, it is ordered and adjudged that said exceptions be and the same are hereby, overruled.

And afterwards, to-wit, on the 18th day of September, 1895, there was duly filed in said court answer to bill of revivor, in words and figures as follows, to-wit:

[10] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Plaintiff,

vs.

JULIA E. HOFFMAN as Executrix of the
Last Will and Testament of Lee Hoffman,
Deceased,

Defendant.

Answer to Bill of Revivor.

The answer of Julia E. Hoffman, as executrix of the last will and testament of Lee Hoffman, deceased, to the bill of revivor filed herein.

In answer to said bill of revivor, I say I admit that on the 21st day of July, 1895, Lee Hoffman, in said bill of revivor mentioned died, leaving a last will and testament, in and by which I, Julia E. Hoffman, was named as executrix of said last will and testament; that on the 26th day of July, 1895, said last will was duly admitted to probate in the County Court of Multnomah County, State of Oregon, and on the same day I, Julia E. Hoffman, was duly appointed executrix of said last will, and I thereupon qualified as such executrix and letters testamentary were duly issued and delivered to me by said court.

[11] Answering the allegation in said bill of revivor that the estate of said Lee Hoffman, deceased, in my possession, is of the amount and value of \$300,000, I say no inventory of the estate of said Lee Hoffman, deceased, has yet been completed and filed, and I do not, therefore admit or deny that the assets of

said estate in my possession amount to said sum of \$300,000, but I say that I verily believe that said estate is solvent, and has sufficient assets in my possession to satisfy any judgment or decree which the plaintiff may recover in this suit..

JULIA E. HOFFMAN, Executrix of the Last
Will and Testament of Lee Hoffman, De-
ceased.

DOLPH, MALLORY & SIMON,
Solicitors for Defendant.

[Endorsed]: Filed Sept. 18, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Wednesday, the 25th day of Sep-
tember, 1895, the same being the 146th judicial day of the reg-
ular April term of said court—present, the Honorable Charles
B. Bellinger, United States district judge presiding—the fol-
lowing proceedings were had in said case, to-wit:

[112] *In the Circuit Court of the United States for the District of
Oregon.*

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	

Order Reviving Suit.

On this day this cause coming on to be heard upon the
application of the complainant for an order reviving this suit
against Julia E. Hoffman, executrix of the last will and testa-
ment of Lee Hoffman, the original defendant herein, who since
the commencement of this suit has died, upon hearing Mr. W.
W. Cotton, of counsel for the complainant, and it appearing to
the court that after the filing of answer herein by the defend-
ant, Lee Hoffman, he died, testate, and that Julia E. Hoffman

has been duly appointed executrix of his last will and testament, that a bill of revivor was heretofore exhibited in this cause against said Julia E. Hoffman as such executrix and process duly served upon her, and that she has made answer to said bill of revivor admitting that she is the duly appointed and acting executrix of said Lee Hoffman, deceased.

Now, therefore, in consideration of the premises, it is adjudged, ordered, and decreed, that this suit, which became
[13] abated by the death of the defendant Lee Hoffman, stand revived and be in the same plight and condition as against the said Julia E. Hoffman, executrix of the last will and testament of said Lee Hoffman, deceased, as defendant in his stead, as said suit was at the time of said abatement.

Dated this 25th day of September, 1895.

CHARLES B. BELLINGER, Judge.

[Endorsed]: Filed September 25, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Monday, the 7th day of October, 1895, the same being the 1st judicial day of the regular October term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding, the following proceedings were had in said case, to-wit:

[14] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix
Substituted for Lee
Hoffman, Deceased.

Defendant.

No. 2204.

Order.

October 7, 1895.

Now, at this day, on motion of Mr. Wirt Minor, of counsel for the plaintiff herein, it is ordered that said plaintiff be, and he is hereby, allowed to file amendments to his bill of com-

plaint herein, and it is further ordered that he be, and he is hereby, allowed to file his replication herein.

And afterwards, to-wit, on the 7th day of October, 1895, there was duly filed in said court, amendment to the bill of complaint, in words and figures as follows, to-wit:

[115] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix,
Substituted for Lee
Hoffman, Deceased,

Defendant.

Amendment to Bill of Complaint.

To the Honorable Judges of the above-entitled Court.

Your petitioner, John McMullen, respectfully shows that heretofore he exhibited his bill of complaint in this Honorable Court against one Lee Hoffman, and said Lee Hoffman made answer to said bill and afterwards died, and this cause having since been revived by order of this court against Julia E. Hoffman, executrix of the last will and testament of said deceased, your petitioner is advised by his counsel that it is necessary for him to amend his bill of complaint in divers particulars, but he does not require further answer from the defendant.

Your petitioner therefore prays that he may be allowed to make to his said bill of complaint the amendments herewith submitted to the court.

And your petitioner will ever pray, etc.

J. McMULLEN,
Petitioner.

L. B. COX,
Of Counsel for Petitioner.

16] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix,
Substituted for Lee
Hoffman, Deceased,

Defendant.

To the Judges of the above-entitled Court.

Your orator herein, John McMullen, upon consideration of the answer which was filed herein by the defendant, Lee Hoffman, prays that his bill of complaint may be amended in line 22, on page 7 thereof by adding to the passage which concludes "and the defendant did on said 4th day of December deny, and still denies, the rights of your orator as a partner in said work and his right to an equal share in the profits thereof," the following allegations, to-wit:

17] "That your orator is advised that among the grounds relied upon by the defendant in his denial of your orator's said rights as a partner there are these: That in the procurement of the contract from the city of Portland herein set forth it was necessary for the defendant, Lee Hoffman, to give a certain bond, with sureties, to the city of Portland for the faithful execution of said contract, and that your orator did not assist in the procurement of said sureties, but required said defendant to procure them alone; that on the 16th day of September, 1893, said defendant expended of his own funds in carrying on the work which was performed under said contract with the city of Portland a large amount of money, to-wit: \$15,990, and that charges for said work were to fall due on the 25th day of September, 1893, to the amount of about \$22,500; that on the 11th day of September 1893, the defendant was notified by the water committee of the city of Portland that said committee was without funds with which to pay the estimate which under the contract was payable on the 25th day of September, and had no assurance that it would be in funds to make said payment, and that in order to be prepared to meet said payment said defendant

secured the sum of \$14,000 on his own account, at loss to himself, which sum of money would not have been necessary if your orator had not refused, as alleged by said defendant, to provide moneys for prosecution of said contract, and that said defendant on said 16th day of September had requested your orator to contribute moneys towards the prosecution of said work; that the defendant denies that your orator contributed anything towards the prosecution of said work under the contract with the city of Portland, but that all that was contributed for such object by any person other than the defendant was contributed by the San Francisco Bridge Co., and not by your orator, and that a certain plant needed and used in the prosecution of said work, and a certain pair of hydraulic shears described in said answer, were so contributed by the San Francisco Bridge Co. and not by your orator.

[118] Thereabout your orator alleges the truth to be that he was willing to aid in the procurement of sureties upon the bond required of the defendant, Lee Hoffman, but said defendant voluntarily assured your orator that he, said defendant, would procure said sureties, and did not desire to have your orator take any action in regard thereto; in regard to the moneys which the defendant, Lee Hoffman, alleged in his answer it was necessary for him to raise in the month of September, 1893, your orator avers the truth to be that said defendant notified your orator on the 16th day of September that he would require your orator to pay in certain moneys on account of said work, but your orator says that at the time said notification was given the defendant was informed, and well knew, that the city of Portland had funds with which to pay the monthly estimate for said work which was to mature on the 25th day of September; that as to whether or not said defendant did procure the sum of \$14,000, or any other sum, on account of moneys to fall due on said 25th day of September, your orator has no knowledge, information or belief, and, therefore, neither admits nor denies the same, but puts defendant to proof thereof: but if the defendant, Lee Hoffman, did raise said moneys, your orator alleges the truth to be that it was wholly unnecessary, and was at the time known to said defendant to be unnecessary, and that same was but a ruse and device on part of defendant to attempt to put your orator in default in regard to said work, and your orator further alleges the truth to be that

with the payment of the moneys which were paid to the defendant, Lee Hoffman, by the said city of Portland in the month of September, 1893, said defendant was fully paid and reimbursed for all moneys which he had theretofore advanced on account of said work, and that the defendant never thereafter was required to advance any moneys on such account, but that all moneys needed in the prosecution of said work were furnished by estimates paid to said defendant by the city of Portland; and in regard to the plant and the hydraulic shears furnished for said work as is set forth in said answer, your orator alleges the truth to be that said plant was the property of the San Francisco Bridge Co., a corporation of which your orator was the principal stockholder and general manager, and that said shears were furnished in the name of said corporation, but that the same were furnished at the instance of your orator and at his charge, and that no charge therefor was ever made by said corporation against the defendant.

L. B. COX, Of Counsel.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

United States of America, }
Northern District of California. } ss.

John McMullen, being duly sworn, deposes and says that he is the above-named complainant; that he has read the foregoing amendments to the bill of complaint herein and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. McMULLEN.

120] Subscribed and sworn to before me this 30th day of September, 1895.

[Seal]

JAMES R. KING,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 7, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 7th day of October, 1895, there was duly filed in said court a replication, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix, Substituted for Lee Hoffman, Deceased,
Defendant

Replication to Answer.

The repliant, John McMullen, saving and reserving to himself all and all manner of advantage of exception which may be had [121] and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is uncertain, evasive, and insufficient in law, to be replied unto by this repliant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true, all which matters and things this repliant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by his said bill he hath already prayed.

L. B. COX, W. W. COTTON, J. N. TEAL, and
WIRT MINOR,
Solicitors for Complainant.

United States of America, } ss.
Northern District of California. }

On this 30th day of September, 1895, before me, the undersigned, personally appeared John McMullen, who being by

me duly sworn says that he has read the foregoing replication and knows the contents thereof, and that the same is true.

JOHN McMULLEN.

Subscribed and sworn to before me the day and year above written.

[Seal]

JAMES L. KING,

Notary Public in and for the City and County of San Francisco,
State of California.

2] Service by copy admitted at Portland, Oregon, Oct. 7th,
1895.

RUFUS MALLORY,

Of Attorneys for Deft.

[Endorsed]: Filed Oct. 7, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Wednesday, the 27th day of November, 1895, the same being the 45th Judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Administratrix.

} No. 220'

Order.

November 27, 1895.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiff herein, it is ordered that the testimony to be taken in this cause be taken before Mr. George A. Brodie, one of the examiners of this court.

[123]

And afterwards, to-wit, on the 16th day of December, 1895, there was duly filed in said court, a stipulation extending time for taking and submitting evidence of both parties, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the
Last Will of LEE HOFFMAN, Deceased.

Defendant.

Stipulation.

It is hereby stipulated and agreed between the parties to the above-entitled cause that the time for taking and submitting evidence in this cause on behalf of both parties may be extended until the first day of February, 1896.

COX, COTTON, TEAL, & MINOR,

Solicitors for Complainant.

DOLPH, MALLORY & SIMON,

Solicitors for Defendant.

[Endorsed]: Filed December 16, 1895. J. A. Sladen, Clerk

[124]

And afterwards, to-wit, on Monday, the 16th day of December, 1895, the same being the 60th Judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding, the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Administratrix.

} No. 2204.

Order.

December 16th, 1895.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiff herein, it is ordered that the time heretofore allowed said plaintiff in which to take his testimony herein, be, and the same is hereby, extended to Saturday, February 1, 1896.

And afterwards, to-wit, on the 23d day of December, 1895, there was duly filed in said court notice of motion to modify order to take testimony, in words and figures as follows, to-wit:

125] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Plaintiff,

vs.

JULIA E. HOFFMAN, Executrix of Lee
Hoffman Deceased.

Defendant.

Motion to Modify.

To John McMullen, Plaintiff, or to Cox, Cotton, Teal, & Minor, his Solicitors.

Please take notice that the defendant will apply to the Court on Saturday, the 28th day of December, 1895, at 10 o'clock A. M. of said day, or as soon thereafter as a hearing can be had, for an order modifying the order heretofore made herein ap-

pointing George A. Brodie, Esquire, examiner, to take and report the evidence in this case, by adding to said order a provision that said examiner first take and report to the Court all the testimony of the witnesses for both parties upon the issues presented in the pleadings as to the good faith of the said plaintiff and Lee Hoffman, deceased, in bidding for and procuring the contract of Hoffman & Bates with the water committee of the city of Portland, described in the pleading filed [126] in the case, and out of which the money was obtained for which the defendant is asked by the complaint filed by the plaintiff he rein to account.

DOLPH, MALLORY & SIMON,

Solicitors for Defendant.

Due service of the within notice by certified copy, as provided by law, is hereby admitted at Portland, Or., Dec. 23rd, 1895.

COX, COTTON, TEAL & MINOR,

Solicitors for Plaintiff.

[Endorsed]: Filed Decem. 23, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Saturday, the 28th day of December, 1895, the same being the 70th Judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix.

} No. 2204.

Order.

December 28, 1895.

Now, at this day comes the plaintiff, by Mr. L. B. Cox, of [127] counsel, and the defendant by Mr. Rufus Mallory, of counsel,

and thereupon said defendant moves the Court for an order instructing the examiner heretofore designated to take testimony in this cause, that said examiner shall take only such testimony as refers to the alleged partnership of the parties hereto, on consideration whereof, it is ordered and adjudged that said motion be, and it is hereby, denied.

And afterwards, to-wit, on Friday, the 31st day of January, 1896, the same being the 98th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Administratrix.

} No. 2204.

Order.

January 31, 1896.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for
28] the plaintiff, and upon stipulation of the parties herein, it is ordered that the time heretofore granted in which to take testimony in this cause be, and the same is hereby, extended to Saturday, February 15, 1896.

And afterwards, to-wit, on Monday, the 10th day of February, 1896, the same being the 106th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Administratrix.

} No. 2204.

Order.

February 10, 1896.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiff, it is ordered that this cause, and the same is hereby, set for trial on Monday, March 2d, 1896.

[129] And afterwards, to-wit, on Tuesday, the 23d day of June, 1896, the same being the 62nd judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN Mc MULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of
the last will of Lee Hoffman, Deceased.
Defendant.

Findings of the Court.

This cause came on to be heard on the second day of March, 1896, upon the issues joined by the pleadings and the proofs taken in support thereof, and was argued by counsel, and the Court not being advised as to what decree should be made in the premises took the matter under consideration until this day; and on this 23rd day of June, 1896, the Court, having duly

considered said pleadings and the evidence introduced in support thereof and the arguments of counsel thereon, finds therefrom as follows, to-wit:

[130] 1. That on the sixth day of March, 1893, Lee Hoffman, since deceased, was entitled to a contract with the city of Portland, in the State of Oregon, for the manufacture and laying of steel pipe from the head works to a point designated as Mount Tabor on a system of waterworks then about to be constructed by the said city of Portland, and for furnishing material therefor, the price to be paid for the same being \$465,667.00; and on said day the said Lee Hoffman and the complainant entered into a written agreement, wherein for valuable consideration it was agreed by and between them that they would jointly execute the work to be done under said contract and furnish the material therefor, each contributing equally to the cost thereof and sharing equally the profits and losses which might result therefrom; and it was further agreed in said instrument that if either party thereto should get a contract to do, or should do, any other part of the work for bringing water to Portland, in connection with said system of waterworks, the profits and losses of such other work should be shared by them jointly.

2. That on the tenth day of March, 1893, a contract was entered into by and between the city of Portland and said Lee Hoffman, in the firm name of Hoffman & Bates, for doing said work and furnishing said material for the amount of money above specified, it also being stipulated in said contract that said city of Portland had the right at any time during the progress of the work to make necessary modifications of the plans, specifications and locations, and in such cases the compensation provided in said contract should be increased or reduced in proportion to the increase or reduction of expense resulting from such modifications.

[131] 3. That the complainant at the time of entering into said contract was a resident of the city of San Francisco, State of California, and said Lee Hoffman was a resident of the said city of Portland, and it was further agreed between them that said Lee Hoffman should have and exercise the active superintendency of said work, but no agreement was entered into between them as to the amount of his compensation therefor.

4. That upon the execution of the contract above-mentioned between said Lee Hoffman and the city of Portland, and in pursuance of the contract between the said Lee Hoffman and the complainant, they, the said Lee Hoffman and the complainant, proceeded with the prosecution of the work contemplated to be done under the contract with the city of Portland, and to furnish materials therefor, said contract having been modified in divers particulars during its progress, the effect whereof was to increase its expense; and, about and prior to the first day of December, 1894, the work to be done and material to be furnished under said contract as modified were completed, and there was earned on said contract the sum of \$509,825.22, of which there was paid to the said Lee Hoffman at divers times on and prior to December 20, 1894, the sum of \$458,842.70, and the sum of \$50,982.52 was withheld by said city of Portland, and less the sum of \$18,627.17 paid to Wolff, Zwicker & Buehner as a debt owing from the complainant and defendant, as hereinafter mentioned, the same is unpaid, although earned and due; that the complainant and the said Lee Hoffman did other work and furnished other material in connection with said contract, for the purpose of bringing water to Portland, and thereby claim to have earned the sum of \$31,073.49, of which the city of Portland has allowed the sum of \$14,112.24, and has disallowed the sum of \$16,961.25. Of said sum of \$14,112.24 there was paid to the said Lee Hoffman at various dates on and prior to the 20th day of December, 1894, the sum of \$11,848.81, and the sum of \$2,263.43 is now withheld by the city of Portland and is unpaid, although earned and due.

5. That the said Lee Hoffman and complainant earned other moneys in the conduct of a camp and supply store for the laborers employed on the work by them conducted, and realized a sum of money on the sale of livestock owned by them and sold at the completion of said work, all of which moneys were paid to the said Lee Hoffman, and have ever since been held by him and the defendant, and no part thereof has been paid to complainant.

6. That the said Lee Hoffman, during his lifetime, and the defendant, as his executrix since his decease, have denied to the complainant any and all interest in the contract between

[133] said Lee Hoffman and the city of Portland, and the work done and material furnished thereunder or in connection therewith and the moneys earned therefrom, as well as in the other work above mentioned as having been performed in bringing water to the city of Portland and moneys earned therefrom, and also in the other moneys realized and received by the said Lee Hoffman from the camp account and the store account and the sale of livestock above mentioned, and the said Lee Hoffman and the defendant have failed and refused to account to the complainant for any of said work, material, or moneys, although the complainant had demanded an accounting and settlement prior to the institution of this suit, but they, the said Lee Hoffman and the defendant, have claimed, and now claim, to hold all said moneys as their own.

7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May, 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman, is proper compensation for his services for superintending said work, and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit.

8. That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned, and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from the city of Portland.

	On contract,	\$509,825.22	
	For extra work,	14,496.74	
			\$524,321.96
	Profits of camp, store, sale of livestock,		
	Interest, etc., etc.,		15,339.76
			<hr/>
	Grand total,		\$539,661.72
	Total gross cost of work, including salary of \$20,000 to Lee Hoffman,		
			<hr/>
	Balance,		\$105,039.59

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Amount retained by city of Portland,	
On account of contract,	\$50,982.52
“ “ “ extra work,	2,263.43
	<hr/>
	\$53,245.95
Less amount paid to Wolff,	
Zwicker & Buehner,	18,627.17
	<hr/>
Now held by city of Portland,	\$34,618.78
Amount drawn out by Lee Hoffman	
and defendant,	72,737.70
	<hr/>
	\$107,356.48
Amount to be paid to San Francisco	
Bridge Co.,	2,316.89
	<hr/>
Balance as above,	\$105,039.59
One-half thereof owing complainant,	\$ 52,519.80

9. That in addition to the moneys above mentioned the complainant and defendant are the owners jointly of the following assets, the true present value of which has not been shown, to-wit: Plant and tools, cost price, \$6,234.60; furniture and fixtures, cost price, \$187.85; camp fixtures, cost price, \$1,246.16; miscellaneous accounts, \$188.75; disallowed claim against the city of Portland, \$16,961.25.

Thereupon, in consideration of the premises, it was ordered, [35] adjudged, and decreed as follows, to-wit:

That the complainant and said Lee Hoffman were partners in the contract between said Hoffman and the city of Portland, and in all the matters and things hereinbefore set forth, and the complainant as such partner, is entitled to an accounting with the defendant as to the receipts and disbursements of the moneys paid or to be paid by the city of Portland on account of its contract with said Lee Hoffman, and the work performed and material furnished by the complainant and said Lee Hoffman thereunder, or in connection therewith, as well as other work done for the purpose of bringing water to the city of Portland, and also as to all the other operations in connection with said work and the moneys received therefrom,

as above set forth; that the complainant is a half-owner with the defendant of the plant and tools, office furniture and fixtures, camp equipment, and all other such property above-mentioned, and that the same be sold and the proceeds be divided between the complainant and defendant; that the complainant is a half owner with the defendant in whatever interest she has in the disputed claim of \$16,961.25 against the city of Portland above mentioned; that the defendant forthwith pay to the San Francisco Bridge Company, out of the moneys in her possession drawn from the proceeds of said work, the sum of \$2,316.89; that the costs of suit of both parties, taxed at \$557.24 be paid out of the common fund, neither party recovering costs of the other, and that the complainant recover judgment against the defendant for the sum of \$52,241.18.

- [136] It is further ordered that the provisional order of injunction heretofore issued against the said Lee Hoffman and continued against the defendant, inhibiting them from drawing from the city of Portland the moneys now held by it as above-mentioned, be discharged in accordance with the stipulation of the parties filed herein.

(Signed)

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed June 23, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 23d day of June, 1896, there was duly filed in said court, an opinion of the Court on final hearing in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon

McMULLEN,

vs.

HOFFMAN.

} No. 2204.

Opinion on Final Hearing.

BELLINGER, J.

This is a suit for an accounting for the profits earned on a [137] contract to construct a pipe line by which the city of Port-

land is supplied with water. The water committee representing the city having advertised for bids to construct the line, the parties hereto entered into an agreement by which the defendants on their joint account bid for the work in the name of Hoffman & Bates. The complainant, with the knowledge and concurrence of defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some \$49,000 higher than the bid of the defendant and was not seriously made. The contract having been awarded to the defendant, a written agreement was entered into by the parties for the execution on joint account of the contract to be entered into by the defendant with the city. The contract awarded on defendant's bid was formally entered into by the city water committee of the one part and by the defendant, in the name of Hoffman & Bates, of the other. The contract proved a profitable one, the profits thereunder amounting to nearly \$140,000. The defendant refused to account to the plaintiff for any part of these profits, upon the ground that the agreement for a joint bid tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and therefore will not be enforced in equity, and upon the further ground that the complainant wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement to share the earnings of the contract with complainant was made.

[138] In this case the contract was in fact the joint contract of these two parties. However immoral the means by which the award of that contract was secured to them, it does not lie in the mouth of either to dispute upon such grounds the right of the other to share in the profits of that contract. This principle has been applied where the contracts were to do what was forbidden by law or by public policy, and were executed, although in this case the contract was to do a lawful thing. It is only when the fund is the result of an immoral transaction that contribution between the wrongdoers will not be enforced. If the means by which this contract was procured are immoral, this would be a good ground for a refusal by an injured party to abide by its conditions. Nor is it a case where one party seeks to enforce an illegal agreement for a share in the profits of a

contract held by another, as was my conclusion when the case was considered upon exceptions to the answer. The contract with the city was, as between the parties, the contract of McMullen & Hoffman. It makes no difference in whose name it was taken, although in fact it was taken in the name of neither, but in that of Hoffman & Bates for the benefit of Hoffman and McMullen. The case is not in the least different from what it would be if the suit was by Hoffman against McMullen for a division of moneys received from the profits of this contract by the latter.

When these questions were considered by me on the exceptions to the answer (69 Fed. R. 509), I was of the opinion that it was within the principle of those cases involving agreements for a division of the fees of public offices and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the Court is asked to compel by its judgment the very thing prohibited by public policy, while in other it is asked to compel payment for a service forbidden by such policy. The question of division of profits between two parties having equal right is a very different one. The distribution of the profits of this contract, which are as much the property of one of the parties as of the other, does not violate any rule of morals or of public policy.

Moreover, the case on the facts differs materially from that presented on the exception to the answer. It is alleged in the answer that the plaintiff was prepared to bid, and but for the secret agreement alleged to have been made, would have bid for the work at a figure some \$40,000 less than that at which the contract was let. This put the plaintiff in the position of seeking to recover in the suit for withholding a lower bid, by which the work was made to cost much more than it would otherwise have cost, and brought the case within the principle of *Atchison v. Mallon*, 43 N. Y. 150, cited and relied on by defendant. In that case each of the parties had intended to make a proposal on his own account, but by an agreement between them to share equally in the profits of an award made to either, one of them had been removed from the number of earnest bidders, thus lessening competition, to the public detriment. Folger, Judge, in delivering the opinion of the Court, said: "If Mallon had promised Atchison a sum of money if he

[140] would refrain from making any proposal, and Atchison, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but because its effect was to remove Atchison from the number of earnest bidders, and thus by lessening competition to detriment the public. And the agreement which was made, laying open to Mallon, just what was the judgment of Atchison of a profitable bid, and removing in effect an interested rival, tended to affect Mallon's action. While Atchison, confident that if Mallon succeeded it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements Courts refuse to enforce."

In this case the uncontradicted fact is that McMullen did not intend to bid for the work in question otherwise than jointly with Hoffman; that he came from San Francisco to bid with Hoffman, not to compete with him, and that this was in pursuance of an understanding had between the parties long before. The agreement was merely to secure co-operation between the parties, and so far from tending to lessen competition, it tended to increase the number of bidders since it does not appear that either of the parties intended to bid or would have bid on his own account. However this may be, it does not appear that the effect of the agreement was to cause, through McMullen's influence, a very much lower bid than Hoffman would have made had he bid on his own account. Hoffman stated to one of the witnesses in the case, that McMullen "made him come down between \$40,000 and \$50,000" in the bid upon which the contract was awarded. It appears [141] that McMullen had procured from his engineer in New York estimates of the cost of the work, and that the amount of such estimate was \$416,088, and there was testimony tending to show that this estimate included \$80,500 as profits. It also appears that Hoffman's engineer at Portland upon careful estimates concluded that the work could be done for \$420,000. What, if anything, was allowed for profits in this estimate does not appear. The defendant's counsel argues from these facts that the knowledge of each of these parties that this work

could be done at a figure far below the bid agreed on and yet leave a large margin for profit would have caused them to make much lower bids, if they had been bidding in competition, than the joint bid made in the name of Hoffman & Bates. But it does not follow that in the absence of an agreement to bid jointly any such several bids would have been made, or that estimates would have been procured; nor is it a ground of complaint that the parties had the advice of capable engineers, and were able to know beforehand that the work could be done for \$416,000 and leave a profit of at least \$80,000. They were under no moral obligation to lower their bid because of the information they had procured, nor in any manner to give the city the benefit of the knowledge they had acquired at their own expense, even if the means of such knowledge were not within the city's reach. There is nothing to criticise in what was done by the parties, unless their conduct in presenting a second bid in the name of the San Francisco Bridge Company operated as a fraud on the committee. When this matter was considered on the exceptions to the answer, I was of the opinion that this was the effect of the second bid. It appeared from the pleadings that the profits from the contract at \$465,667 amounted to nearly \$140,000, and it seemed a necessary inference that a bid by a company such as the one in question, based presumably upon careful estimates, to do the work for \$514,664, influenced the award that was made. But this view cannot be sustained. An attempt to deceive must be successful in order to operate as a fraud. If the second bid in this case was in effect a misrepresentation made with a fraudulent intent, it must, in order to avail the defendant, appear to have been acted upon by the committee—to have influenced their action to the public detriment. However reprehensible the act of the parties was in making the second bid, there is no presumption of fraud arising from it, and it does not appear from the evidence in the case that the water committee was in any degree influenced by it in awarding the contract. On the contrary, the testimony of the chairman of the committee is that the bid of the San Francisco Bridge Company did not have the slightest influence with him, and it appears that the engineer of the water committee had, some three months previously, made for the information of the committee, an esti-

42]

mate of the cost of the work covered by these bids, and that such estimate was higher than the bid of the San Francisco Bridge Company. That bid, as already stated, was \$514,664. How much higher the city engineer's estimate was than this figure is not stated. But with this estimate, higher than the second bid and nearly \$50,000 higher than the bid of Hoffman & Bates, before them, there is, without the testimony referred to, no room for an inference that the committee was influenced [143] by the second bid, or consulted it. Moreover, it is in evidence that there were three higher bids than that of the San Francisco Bridge Company before the committee when the contract was awarded to Hoffman & Bates.

In the accounting the only question of serious contest is as to the amount to be allowed Hoffman for his services in conducting the business of the parties under their contract. Hoffman claimed and credited himself at the rate of \$1,000 per month for his services. In fixing the amount to be allowed on this account the responsibility assumed by Hoffman is to be considered. McMullen wholly failed to contribute his share or any share, above a plant valued at \$2,000, to the work being carried on. Hoffman made repeated and urgent appeals to McMullen for the money that the latter was in duty bound to provide. To these appeals McMullen had always the same answer, which was that he did not have the money then and could not obtain it. On one occasion he suggested that Hoffman should stand the creditors of the partnership off; and he suggested at different times the means by which Hoffman might raise the needed money on their joint note. It is argued for McMullen that Hoffman had credit at the banks, and could borrow what money was needed, but that does not excuse McMullen for failure to fulfill the obligations he was under. Hoffman was not required to use his own credit for McMullen's benefit. McMullen was a nonresident. His company was insolvent. He was without credit, and it is not against Hoffman that his own credit was good. McMullen's name upon a joint note would be of no assistance to Hoffman in procuring needed funds, which after all must be had upon Hoffman's credit. [144] There was such an entire failure on McMullen's part to fulfill his obligations in the contract, that Hoffman would, in my judgment, have been justified in treating the contract as aban-

done by McMullen, and this was threatened. It is only from the fact that Hoffman continued to recognize McMullen's relation in the business by regularly charging for his own services that I am justified in treating the partnership relation as having continued. The entire burden was upon Hoffman, and it involved not only the conduct of the business of constructing the work, but all the money responsibility that attached to it, and this goes to increase the amount to which Hoffman is in good conscience entitled for his services, on which account he is entitled to be paid at the rate charged.

(Signed) CHARLES B. BELLINGER,
Judge.

[Endorsed]: Filed June 23, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 23d day of June, 1896, there was duly filed in said court a stipulation, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant.

vs.

JULIA E. HOFFMAN, Executrix of the
Last Will of Lee Hoffman, Deceased,

Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit that the provisional order of injunction heretofore issued against the defendant herein, inhibiting and restraining her from drawing from the city of Portland the moneys now owing from said city of Portland on account of the contract between the city and Lee Hoffman, deceased, for the manufacture and laying of steel pipe from head works to Mount Tabor in the system of waterworks constructed for

the city of Portland, and extra work done in connection therewith, be modified so that the defendant, acting jointly with the complainant, may be, and she hereby is, allowed to draw from the city of Portland the sum of money now owing by it on said account, to-wit, \$34,618.78, together with such interest as may be recoverable thereon.

- [146] And it is further stipulated that in case said moneys are paid by the city of Portland to the parties to this suit jointly, they will jointly deposit the same with the Security Savings & Trust Company, of the city of Portland, subject to the joint order of the complainant and defendant, or their counsel; if the defendant shall within fifty-seven days from this date, said money in the meantime having been paid over and deposited as aforesaid, take an appeal from the decree rendered herein, and give a supersedeas bond, then the moneys on deposit shall be drawn by the defendant, and the complainant, or his counsel, will join in an order on the bank therefor; but if the defendant shall not within the said time take such appeal and give such supersedeas bond, then the moneys shall be drawn by the complainant and applied to the satisfaction of his judgment against the defendant, and the counsel for the defendant will join in an order therefor; in case said money shall not be paid over by the city of Portland within said fifty-seven days, then in case it shall be thereafter paid the same disposition thereof shall be made, that is to say, if an appeal has been taken by the defendant within said fifty-seven days and a supersedeas bond given, the money shall be retained by her, otherwise it is to be paid to the complainant and applied on his judgment.

Dated this 23d day of June, 1896.

COX, COTTON, TEAL & MINOR,

Solicitors for Complainant.

DOLPH, MALLORY & SIMON,

Solicitors for Defendant.

[Endorsed]: Filed June 23, 1896. J. A. Sladen, Clerk.

-
- [147] And afterwards, to-wit, on the 15th day of July, 1896, there was duly filed in said court a cost bill, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix,

Defendant.

Memorandum of Costs.

Statement of disbursements claimed by the complainant in the above-entitled cause, viz:

Clerk's fees	\$ 77.32
Marshal's fees	21.36
Costs in State Circuit Court	
Attorney's fee	20.00
Attorney's fee for taking 2 depositions, at \$2.50 each.	5.00
Depositions	20.70
Examiner's fees	199.90
Referee's fees	
Witness' fees: Isaac Smith, \$3.25; F. T. Dodge, \$3.25;	
P. L. Willis, \$1.62; J. Kiernan, \$1.62; P. Buchner,	
\$1.62; J. B. David, \$4.50; R. Wakefield, \$1.62; D. P.	
48] Thompson, \$1.62; J. Bays, \$1.62; S. W. Aldrich,	
\$1.62; J. B. Montgomery, \$1.62; A. Donnell, \$1.62..	25.58
Exhibits	3.50
<hr/>	
Total taxed at	373.36

J. A. SLADEN,

Clerk.

Service of the within statement of costs served on me this 15th day of July, 1896.

RUFUS MALLORY,

Of Sol'r's for Deft.

District of Oregon, ss.

I, L. B. Cox, being duly sworn, on my oath say that I am one of the attorneys for the complainant in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said complainant is entitled to recover the same from the defendant, as I verily believe.

L. B. COX.

Subscribed and sworn to before me this 15th day of July, 1896.

[Seal]

JOSEPH N. TEAL.
Notary Public for Oregon.

[Endorsed]: Filed July 15, 1896. J. A. Sladen, Clerk.

49]

And afterward, to-wit, on the 4th day of August, 1896, there was duly filed in said court, a petition for appeal, and assignment of errors, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Administratrix of
the Estate of Lee Hoffman, Deceased.

Defendant.

Petition for Appeal.

To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

Your petitioner, Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, defendant herein, brings this her petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered before your Honors in the above-entitled cause, on the 23rd day of June, 1896; and thereupon, as for such petition,

your petitioner shows that your petitioner is defendant in the above-entitled cause. That the complainant's complaint therein is for a decree declaring a partnership to have existed 50] between the complainant and Lee Hoffman in his lifetime, for performing a certain contract entered into between said Lee Hoffman, in the name of Hoffman & Bates, with the water committee of the city of Portland, Oregon, dated the 10th day of March, 1893, for manufacturing and laying certain steel pipe for conveying the water of Bull Run river to Mount Tabor for an accounting of the business of such partnership and a division of the profits thereof, and for an accounting for and division of the profits derived from extra work claimed to have been done in connection with said manufacturing and laying of said pipe, and an accounting for profits alleged to have been realized from camp stores and other sources connected with said work, and for the dissolution of said partnership, for a receiver and other relief in said bill of complaint set forth. That defendant answered said bill of complaint and the complainant filed exceptions thereto. Pending said exceptions said Lee Hoffman deceased, and Julia E. Hoffman, executrix of the will of said Lee Hoffman, was substituted as defendant. Said exceptions were, after argument, overruled, and complainant filed a general replication to said answer, and thereupon this cause was heard upon the evidence and a decree for relief substantially as prayed for was on the said 23rd day of June, 1896, rendered against said defendant.

Wherefore your petitioner now prays an order to be made allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree so entered. And thereupon your petitioner now shows to the Court that she is advised by her counsel, and so charges the same to be, that 51] there was error of said Circuit Court, by the Court committed, in the course of the proceedings in the said cause in the decree so as aforesaid tried; and your petitioner now respectfully sets forth and shows that error was committed, and makes the following assignments thereon as for her assignments of error on her appeal.

Assignment of Errors.

It is respectfully submitted that error was committed by said court:

First. In making findings numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, and 9, and in making and entering the following decree in said cause on the 23rd day of June, 1896, to-wit:

"This cause came on to be heard on the second day of March, 1896, upon the issues joined by the pleadings and the proofs taken in support thereof, and was argued by counsel, and the Court not being advised as to what decree should be made in the premises took the matter under consideration until this day and on this 23d day June, 1896, the Court, having duly considered said pleadings and the evidence introduced in support thereof, and the arguments of counsel thereon, finds therefrom as follows, to-wit:

[152] 1. That on the sixth day of March, 1893, Lee Hoffman, since deceased, was entitled to a contract with the city of Portland, in the State of Oregon, for the manufacture and laying of steel pipe from the head works to a point designated as Mount Tabor on a system of waterworks then about to be constructed by the said city of Portland, and for furnishing material therefor, the price to be paid for the same being \$465,667.00; and on said day the said Lee Hoffman and the complainant entered into a written agreement, wherein for valuable consideration it was agreed by and between them that they would jointly execute the work to be done under said contract and furnish the material therefor, each contributing equally to the cost thereof and sharing equally the profits and losses which might result therefrom, and it was further agreed in said instrument that if either party thereto should get a contract to do, or should do, any other part of the work for bringing water to Portland, in connection with said system of waterworks, the profits and losses of such work should be shared by them jointly.

2. That on the tenth day of March, 1893, a contract was entered into by and between the city of Portland and said Lee Hoffman, in the firm name of Hoffman & Bates, for doing said work and furnishing said material for the amount of money above specified, it also being stipulated in said contract that said city of Portland had the right at any time during the progress of the said work to make necessary modifications to the

plans, specifications and locations, and in such cases the compensation provided in said contract should be increased or reduced in proportion to the increase or reduction of expense resulting from such modifications.

53] 3. That the complainant at the time of entering into said contract was a resident of the city of San Francisco, State of California, and said Lee Hoffman was a resident of the city of Portland, and it was further agreed between them that said Lee Hoffman should have and exercise the active superintendency of said work, but no agreement was entered into between them as to the amount of his compensation therefor.

4. That upon the execution of the contract above mentioned between said Lee Hoffman and the city of Portland, and in pursuance of the contract between the said Lee Hoffman and the complainant, they, the said Lee Hoffman and the complainant, proceeded with the prosecution of the work contemplated to be done under the contract with the city of Portland and to furnish materials therefor, said contract having modified in divers particulars during its progress, the effect whereof was to increase its expense; and, about and prior to the first day of December, 1894, the work to be done and material to be furnished under said contract as modified were completed, and there was earned on said contract the sum of \$509,825.22, of which there was paid to the said Lee Hoffman at divers times on and prior to December 20, 1894, the sum of \$458,842.70, and the sum of \$50,982.52 was withheld by said city of Portland, and, less the sum of \$18,627.17 paid to Wolf, Zwicker and Buehner as a debt owing from the complainant and defendant as hereinafter mentioned, the same is unpaid, although earned and due; that the complainant and said Lee Hoffman did other work and furnished other material in connection with said contract, for the purpose of bringing water to Portland, and 154] thereby claim to have earned the sum of \$31,073.49, of which the city of Portland has allowed the sum of \$14,112.24, and had disallowed the sum of \$16,961.25. Of said sum of \$14,112.24 there was paid to the said Lee Hoffman at various dates on and prior to the 20th day of December, 1894, the sum of \$11,848.81 and the sum of \$2,263.43 is now withheld by the city of Portland, and is unpaid, although earned and due.

5. That the said Lee Hoffman and complainant earned other in the conduct of a camp and supply store for the laborers em-

ployed on the work by them conducted, and realized a sum of money on the sale of livestock owned by them and sold at the completion of said work, all of which moneys were paid to the said Lee Hoffman, and have ever since been held by him and the defendant for their own use, and no part thereof has been paid to complainant.

[155] 6. That the said Lee Hoffman, during his lifetime, and the defendant, as his executrix since his decease, have denied to the complainant any and all interest in the contract between said Lee Hoffman and the city of Portland, and the work done and material furnished thereunder or in connection therewith and the moneys earned therefrom, as well as in the other work above mentioned as having been performed in bringing water into the city of Portland and the moneys earned therefrom and also in the other moneys realized and received by the said Lee Hoffman from the camp account and the store account and the sale of livestock above mentioned, and the said Lee Hoffman and the defendant have failed and refused to account to the complainant for any of said work, material or moneys, although the complainant had demanded an accounting and settlement prior to the institution of this suit, but they, the said Lee Hoffman and the defendant, have claimed, and now claim, to hold all said moneys as their own.

7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman, is proper compensation for his services for superintending said work and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit.

8. That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned, and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from the city of Portland.

On contract,	\$509,825.22	
For extra work,	14,496.74	\$524,321.96
Profits of camp, store, sale of livestock,		
Interest, etc., etc.,		15,339.76

Grand total	\$539,661.72
Total gross cost of work, including salary of \$20,000 to Lee Hoffman,	\$434,622.13
Balance,	\$105,039.59
156] Amount retained by city of Portland,	
On account of contract,	\$50,982.52
" " " extra work,	2,263.43
	53,245.95
Less amount paid to Wolff, Zwicker & Buehner,	18,627.17
Now held by city of Portland,	\$34,618.78
Amount drawn out by Lee Hoffman and defendant.	72,737.70
	\$107,356.48
Amount to be paid to San Francisco Bridge Co.,	2,316.89
Balance as above,	\$105,039.59
One-half thereof owing complainant,	\$ 52,519.80

9. That in addition to the moneys above mentioned the complainant and defendant are the owners jointly of the following assets, the true present value of which has not been shown, to-wit: Plant and tools, cost price, \$6,234.60; furniture and fixtures, cost price, \$187.85; camp fixtures, cost price, \$1,246.16; miscellaneous accounts, \$188.75; disallowed claim against the city of Portland, \$16,961.25.

Thereupon in consideration of the premises it was ordered, adjudged and decreed as follows, to-wit:

157] That the complainant and said Lee Hoffman were partners in the contract between said Hoffman and the city of Portland and in all the matters and things hereinbefore set forth, and the complainant, as such partner, is entitled to an accounting with the defendant as to the receipts and disbursements of the money paid or to be paid by the city of Portland on account of its contract with said Lee Hoffman and the work performed and material furnished by the complainant and said Lee Hoffman thereunder, or in connection therewith, as well as other

work done for the purpose of bringing water to the city of Portland, and also as to all the other operations in connection with said work and the moneys received therefrom, as above set forth; that the complainant is a half owner with the defendant of the plant and tools, office furniture and fixtures, camp equipment and all other such property above mentioned, and that the same be sold and the proceeds be divided between the complainant and defendant; that the complainant is a half owner with the defendant in whatever interest she has in the disputed claim of \$16,961.25 against the city of Portland above mentioned; that the defendant forthwith pay to the San Francisco Bridge Company, out of moneys in her possession drawn from the proceeds of said work, the sum of \$2,316.89; that the cost of suit of both parties, taxed at \$557.24, be paid out of the common fund, neither party recovering costs of the other, and that the complainant recover judgment against the defendant for the sum of \$52,241.18.

[158] It is further ordered that the provisional order of injunction heretofore issued against said Lee Hoffman and continued against the defendant, inhibiting them from drawing from the city of Portland the moneys now held by it as above mentioned, be discharged in accordance with the stipulation of the parties filed herein."

Because it appears by the complaint and answers of the defendant to the bill of complaint filed in the said cause, and by the testimony submitted on the trial and fully set out in the record, that the alleged contract of partnership sought by said complainant to have established by decree of this Court and the alleged profits thereof divided was and is void as against public policy, and because the said Court did not render and enter a decree dismissing said bill.

2. It is respectfully submitted that error was committed in said court in said decree in ordering and decreeing that said complainant and Lee Hoffman were partners from the said 6th day of March, 1893, and continued to be such partners up to and until the said 23rd day of June, 1896, and in decreeing that said partnership be then dissolved and in decreeing that said complainant was and is entitled to one-half the profits of said contract, dated the 10th day of March, 1893, made by the water committee of the city of Portland with Hoffman & Bates for the manufacturing and laying steel pipe for

conveying the water from Bull Run river from head works to Mount Tabor, and of extra work done under and in connection with said contract and extra work not connected with said contract, and from camp stores and other sources connected with said work of manufacturing and laying said steel pipe. Because it appears in the answer filed in said cause and from the testimony in the record that said complainant committed a
59] breach of his said agreement contained in said contract of March, 1893, between complainant and Lee Hoffman, and failed, neglected, and refused to pay his share of money necessary to carry on said contract of manufacturing and laying said steel pipe, and that in consequence thereof the said Lee Hoffman on the 20th day of September, 1893, dissolved said partnership, and the same then ceased to exist, and the complainant thereafter took no part in conducting said business, and did not act in connection therewith, and was not thereafter recognized by said Hoffman as a partner therein. That from and after said date the entire control, management, execution and responsibility of said contract was upon the said Lee Hoffman and not upon the complainant, and that any profits which may have been earned after the said 20th day of September, 1893, belonged wholly to the said Hoffman, and did not belong to the said alleged partnership composed of the complainant and said Lee Hoffman. That if said complainant was entitled to any profits whatever as a result of said partnership they were such only as may have been earned between the said 6th day of March, 1893, and the 20th day of September, 1893, and was not entitled to any profits earned after the last named date.

Third. It is respectfully submitted that error was committed by said Court in said decree in decreeing that said complainant recover judgment against the defendant for the sum of \$52,241.18; because it appears from the testimony in the record that of the \$105,039.59 profits of said alleged partnership
60] no more than \$60,421.32 were ever paid or received by the said Lee Hoffman and the defendant. That at the time said decree was rendered, to-wit, on the 23rd day of June, 1896, there were retained in the hands of the water committee of the city of Portland of earnings under said contract the sum of \$34,618.17, which has never been received by or paid to said Lee Hoffman or this defendant, as his executrix, and the complainant is not

entitled to any judgment for any portion of said sum against the defendant.

Fourth. It is respectfully submitted that error was committed by said Court in said decree in ordering and decreeing that the defendant forthwith pay to the San Francisco Bridge Company out of moneys in her possession drawn from the proceeds of said work the sum of \$2,316.89, because the testimony in this cause shows that the complainant claims the said sum of \$2,316.89 as advanced by himself as his contribution to the execution of said contract between himself and Lee Hoffman under the said contract of March 6, 1893, and was not, and is not, due to said San Francisco Bridge Company, but to the complainant, and that no money whatever is due to the San Francisco Bridge Company.

Wherefore said defendant, Julia E. Hoffman, executrix, prays that the said decree and order be reversed, and that said Court may be directed to enter a decree in accordance with the prayer of defendant's answer to the petition herein, or such decree as shall be found to be according to equity under the evidence in this cause.

DOLPH, MALLORY & SIMON,
Solicitors for Defendant.

[Endorsed]: Filed Aug. 4, 1896. J. A. Sladen, Clerk.

[161] And afterwards, to-wit, on Tuesday, the 4th day of August, 1895, the same being the 98th judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix.

Defendant.

Order Allowing Appeal of Julia E. Hoffman.

Now, at this day, comes the defendant, Julia E. Hoffman, by Mr. Rufus Mallory, of counsel, and presents to the Court her petition for the allowance of an appeal from the decree heretofore entered against her in this cause, to the United States Circuit Court of Appeals for the Ninth Circuit, and presents her bond for damages and costs on such appeal with Geo. W. Bates and Robert Wakefield in the sum of \$60,000.00.

Whereupon, it is ordered that said defendant be, and is hereby, allowed to take an appeal to the said Circuit Court of Appeals, as prayed for in said petition, and that said bond be, and the same is hereby, approved.

Dated August 4, 1896.

CHARLES B. BELLINGER,

Judge.

2] [Endorsed]: Filed August 4, 1896. J. A. Sladen, Clerk.

And afterward, to-wit, on the 4th day of August, 1896, there was duly filed in said Court a bond on appeal, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant.

vs.

JULIA E. HOFFMAN, Executrix.

Defendant.

Bond on Appeal of Julia E. Hoffman.

Know All Men by These Presents, that we, Julia E. Hoffman, executrix, as principal, and Geo. W. Bates and Robert Wakefield, as sureties, are held and firmly bound unto John McMullen, the complainant, in the full and just sum of sixty thousand dollars, to be paid to the said John McMullen, his executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 4th day of August, 1896.

[163] Whereas, lately at a Circuit Court of the United States for the District of Oregon in a suit depending in said court between John McMullen, complainant, and Julia E. Hoffman, executrix of the last will of Lee Hoffman, late of Multnomah county, Oregon, deceased, defendant, a decree was rendered against said Julia E. Hoffman, executrix, and said Julia E. Hoffman having obtained a writ of appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit and a citation directed to said John McMullen, and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, on the day of next,

Now, the condition of the above obligation is such, that if the said Julia E. Hoffman, executrix, shall prosecute said writ of appeal to effect and answer all damages and costs, if she fail

to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JULIA E. HOFFMAN. [Seal]

By **DOLPH, MALLORY & SIMON**, Solicitors.

GEO. W. BATES. [Seal]

ROBT. WAKEFIELD. [Seal]

Sealed and delivered in the presence of:

P. L. Willis.

United States of America, }
District of Oregon. } ss.

I, Geo. W. Bates, being first duly sworn, depose and say I am one of the sureties named in the foregoing bond; that I am a resident and freeholder within said District, and that I am worth in property situated therein the sum of one hundred and twenty thousand dollars, exclusive of property exempt from execution.

GEO. W. BATES.

Subscribed and sworn to before me this 4th day of August, 1896.

[Seal]

P. I. WILLIS,
Notary Public for Oregon.

United States of America, }
District of Oregon. } ss

I, Robt. Wakefield, being first duly sworn, depose and say I am one of the sureties named in the foregoing bond; that I am a resident and freeholder within said District, and that I am worth in property situated therein the sum of fifty thousand dollars, exclusive of property exempt from execution.

ROBT. WAKEFIELD.

Subscribed and sworn to before me this 4th day of August, 1896.

P. L. WILLIS,
Notary Public for Oregon.

Approved:

CHARLES B. BEWINGER,
Judge.

[Endorsed]: Filed August 4th, 1896. **J. A. Sladen,** Clerk.

- [165] And afterwards, to-wit, on Wednesday, the 19th day of August, 1896, the same being the 111th judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER United States District Judge presiding—the following proceedings were had in said case, to-wit

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix.

No. 2204.

Order Extending Time to File Transcript.

August 19, 1896.

Now, at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant herein,

It is ordered that the time heretofore allowed by this Court in which to file the transcript of record in this cause, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, be, and the same is hereby, extended to, and including, Monday, the fifth day of October, A. D. 1896.

CHARLES B. BELLINGER,

Judge.

- [166] And afterwards, to wit, on the 17th day of September, 1896, there was duly filed in said Court a stipulation as to evidence, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon

JOHN McMULLEN,

Complainant.

vs.

JULIA E. HOFFMAN, Executrix,

Defendant.

Stipulation as to Evidence.

The parties to this suit, by their counsel, stipulate and agree as follows:

1st. That prior to the sixth day of March, 1893, the city of Portland, through its water committee, advertised for bids for

the construction of a system of waterworks for conveying the water of Bull Run river to the city of Portland, the work to be bid for in several classes.

2nd. That for manufacturing and laying steel pipe for conveying water from the head works at Bull Run to Mount Tabor Lee Hoffman, the original defendant in this suit, doing business under the name of Hoffman & Bates, was a bidder, and the lowest bidder, and the contract for performing that portion of the work was awarded to him.

37] 3rd. That on the tenth day of March, 1893, a contract was entered into between the said Hoffman and the water committee, Hoffman acting in the name of Hoffman & Bates, whereby said Hoffman undertook and promised to furnish all the material and labor for constructing and completing said pipe line from the head works at Bull Run to Mount Tabor, according to certain specifications which were attached to and made a part of said contract, and to turn the same over completed to the city of Portland, in consideration whereof the city of Portland agreed to pay the sum of \$465,667.00. The city, however, reserved the right to make any changes in the specifications it thought proper, the pay for the work to be increased or diminished as the change increased or diminished the cost of the work. Payments were to be made as the work progressed, monthly estimates to be made by the city engineer and ninety per cent of the amount earned under the contract in any one month was to be paid by the 20th day of the following month. It was further provided by the said specifications that said Hoffman should turn said work over to the city when completed, and should keep the same in thorough repair and guarantee the city against all loss, costs or damages from breaks or leaks for a period of six months after the water should have been running full pressure through the whole length of said pipe, and in case said Hoffman failed in this, the city reserved the right to do the work and deduct the costs from the money retained in the hands of the city, and that when the said work was finally accepted the whole amount then due for said work should be paid.

8] 4th. That the work of furnishing the material, constructing and laying said pipe as provided for by said contract, and of doing such extra work and furnishing such extra materials as

were required by said city was completed and water was turned full pressure through said pipe about the first day of January, 1895.

5th. That payments were made to said Hoffman in monthly payments as provided in said contract.

6th. That the total sum earned under said contract and the extra work required by and allowed for by the city is, viz: Under the contract \$509,825.22 extra work not under contract \$14,496.74; making a total earned and allowed, \$524,321.96.

7th. That at the time of the commencement of this suit there were in the hands of the city earned and due for said work the following sums, viz: 10 per cent retained as per contract \$50,982.52; extra work allowed \$2,263.43; making a total of \$53,245.95.

8th. That during the progress of said work a store was kept, laborers were boarded, from which and other sources a profit was realized amounting to \$15,339.76, making the total amount paid, added to the amount earned, allowed and unpaid, \$539,661.72.

9th. That the total cost of said works, as shown by the books kept by said Hoffman, was \$434,622.13, showing a net profit of \$105,039.59.

[169] 10th. That said Hoffman claimed to have performed other extra work and furnished other materials for which he claimed compensation, but which said committee rejected and refused to allow. That the amount so claimed and rejected by the city is about \$17,000.00, which claim was unsettled at the time this suit was commenced.

11th. That the work of manufacturing said pipe and of conveying the same from the place of manufacture to the place of use was sublet by said Hoffman, the former to Wolff, Zwicker & Buehner, and the latter to Cook & Kiernan, and it was provided in the contract of subletting that the subcontractors should be paid for their work by Hoffman as allowance, and payment was made to him by the city of Portland.

12th. That said Hoffman drew from the money earned on said work as his salary as general superintendent and manager the sum of eight thousand dollars on December 30, 1893, and the sum of \$12,000.00 on September 30, 1894 (being the full amount claimed for the year 1894), and entered the same on his

books of account, kept in connection with the said work, as a part of the expense of executing said contract with the city.

13th. That the books of account kept by Hoffman in connection with the work show credits to the San Francisco Bridge Company of June 30, \$983.05, July 31, \$1,333.84, making a total of \$2,316.89.

14th. That prior to June 30, 1893, said Hoffman had contributed toward the work the sum of \$3,100.27, which was entered to his credit on the books of account on said day, and thereafter he advanced toward the prosecution of said work at various dates between June 30 and September 30, 1893, divers other sums of money, viz:

June 30,	\$ 29.75
“ “	72.90
July 1,	7,000.00
July 28,	5,000 00
July 31,	3.64
July 31,	800.88
Aug. 31.	1,550.44
Sept. 30,	104.00

The total of all advances to October 1 being \$17,609.91.

All of said sums were placed to the credit of said Hoffman on the dates stated. That thereafter divers small sums of money were advanced by said Hoffman and divers amounts drawn by him against the same his books carrying the following monthly balances of credits in his favor, viz:

1893

November 1,	\$17,629.16
December 1,	17,661.66

1894

January 1,	14,763.22
February 1,	14,763.22
March 1,	14,791.72
April 1,	14,791.72
May 1,	14,807.72
June 1,	15,628.72
July 1,	15,631.00
September 1,	15,663.30

On September 30, 1894, said last-mentioned sum was drawn by said Hoffman.

Julia E. Hoffman, Executrix, etc.

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15th. That the sums of money on hand to the credit of said work on the first day of each month from August 1, 1893, to and inclusive of August 1, 1895, are as follows, to-wit.

August 1,	\$ 5,259.20
September 1,	14,130.95
October 1,	28,175.58
November 1,	34,663.04
December 1,	36,502.29

1894

January 1,	37,791.10
January 1,	37,791.10
February 1,	32,793.43
March 1,	29,703.33
April 1,	29,343.89
May 1,	24,201.72
June 1,	37,146.62
July 1,	51,938.23
August 1,	54,573.52
September 1,	54,077.61
October 1,	74,240.10
November 1,	66,918.50
December 1,	57,108.63

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1895.

January 1,	80,524.85
February 1,	66,180.13
March 1,	6,013.94
April 1,	5,712.07
May 1,	4,307.11

1895.

June 1,	64,286.61
July 1,	24,112.06
August 1,	13,882.66

That all bills outstanding against said work were paid during each month, and the sums sets forth above represent net balances on hand after the bills of the preceding months had been paid.

16th. That on September 1, 1893, there was to the credit of Hoffman & Bates the sum of \$14,130.95, and the amounts payable during the month subject to the recitals in the 11th paragraph of this stipulation were as follows:

Pay roll for August.....	\$11,982.40
General accounts	1,198.34
Audited vouchers	9,737.68
Wolff, Zwicker & Buehner	24,741.37
Cook & Kiernan	5,102.43

\$52,762.22

That the city paid on the 20th of September \$66,806.58.

That the estimates for August, ninety per cent of which were due and payable September 20, were \$74,229.83.

That all outstanding demands Sept. 20, 1893, to-wit, \$52,762.22, were paid.

17th. That said Hoffman and defendant, after his decease, drew personally from the sums of money to the credit of said work in addition to the sum of \$15,663.30, drawn September 30, 1894, to repay advances and the sum of \$8,000, drawn Dec. 30, 1893, on account of salary and the sum of \$12,000, drawn Sept. 30, 1894, on account of salary, the following sums at the dates stated, to-wit:

1895.

Jan. 31,	\$ 8,855.04
June 17,	40,000.00
July 1,	10,000.00
Aug. 5,	13,882.66

\$72,737.70

That he has not accounted to or paid defendant any part of said amount.

18th. That nothing contained in this stipulation and especially in the second and third paragraphs or either thereof, shall be deemed a waiver in any degree of the claim made by the complainant that the bid made by Hoffman was on behalf of [74] himself and complainant jointly, and that the contract entered into with the city of Portland by Hoffman was in the joint interest of himself and complainant.

19th. It is understood and agreed that the foregoing stipulations are to take the place of plaintiff's exhibits numbered respectively from No. 2 to No. 14 and No. 17 to No. 21, both inclusive, Nos. 27 and 28.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

DOLPH, MALLORY & SIMON,
Solicitors for Defendant.

[Endorsed]: Filed September 17, 1896. J. A. Sladen, Clerk

And afterwards, to-wit, on the 19th day of September, 1896, there was duly filed in said court, a petition of John McMullen for an appeal, and assignment of errors in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Last
Will of Lee Hoffman, Deceased,

Defendant.

Petition of John McMullen for Appeal and Assignment of Errors.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

[175] Your petitioner, John McMullen complainant in the above-entitled cause, submits this his petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree rendered and entered in the above-entitled court and cause on the 23rd day of June, 1896, or from so much of said decree as is hereinafter specified, and thereupon your petitioner respectfully represents that he is complainant in the above-entitled cause; that in and by his bill of complaint filed therein he sought a decree of the above-entitled Honorable Court declaring a partnership to have been formed between himself and one Lee Hoffman on the 6th day of March, 1893, for performing a contract entered into between said Hoffman on behalf of himself and the complainant, with the city of Portland, Oregon, acting through its water committee, on the 10th day of March, 1893, for manufacturing and laying steel pipe from a point known as "headworks" to a point known as "Mount Tabor" on the system of waterworks which the said city of Portland was then about to have constructed, and for a finding in said decree that said partnership between the complainant and said Lee Hoffman had continued through the execution of said work, and that in accordance with the

provisions of said partnership agreement the complainant was entitled to share with said Lee Hoffman the profits realized upon the execution of said work; and it was further sought in and by said bill of complaint and in and by said decree to have an accounting of the business of said copartnership, including certain extra work done in connection with said contract between said Lee Hoffman and the city of Portland, for the purpose of bringing water to said city by means of said system of waterworks, as was provided and contemplated in the contract between the complainant and said Lee Hoffman and also to have an accounting for certain moneys realized by said Lee Hoffman from other sources in connection with said work, to-wit, from a supply store, and a boarding camp, and certain live-stock, plant, etc.; and to secure a decree determining said partnership and requiring the payment of such moneys as should be awarded the complainant, and for general relief; and complainant further represents that process was duly served upon the defendant in said suit, Lee Hoffman, and that thereupon he appeared in court and answered said bill; that the complainant filed exceptions to the answer, and, pending the determination of the Court upon said exceptions, said Lee Hoffman died, leaving a will, whereof the above-named defendant, Julia E. Hoffman, was appointed executrix, and upon application duly made she, as such executrix, was substituted as defendant for the said Lee Hoffman in said suit, and said suit was revived. The exceptions filed by the complainant to the answer of the defendant were duly argued by counsel, and were in part sustained and in part overruled by the Court, and thereupon the complainant filed amendments to his bill and a general replication to the answer, and the cause was referred to an examiner of the above-entitled court for the purpose of taking the proofs, and the cause was afterwards heard upon said proofs and arguments of counsel, and a decree was on the 23rd day of June, 1896, rendered in favor of the complainant and against the defendant, finding, among other things, that there had been earned as profit on the execution of the contract and work above mentioned the sum of \$105,039.59, whereof one-half, or the sum of \$52,519.80, belonged to the complainant, and the costs of suit having been ordered by the Court to be paid out of a common fund, judgment was awarded in favor of

the complainant and against the defendant for the sum of \$52,241.18.

Your petitioner now prays that an order may be made allowing him to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the said decree, or from so much thereof as limits the amount of money to which the complainant is entitled to the said sum of \$52,241.18; and thereabout your petitioner shows to the Court that he is advised by counsel, and charges the fact so to be, that there was error in the above-entitled court, committed in the decree rendered, in the following particulars, which your petitioner respectfully submits and charges as his assignment of error on this appeal.

Assignment of Errors.

First. Your petitioner respectfully submits that the court erred in making its finding of fact No. 7, the same being as follows, to-wit:

"7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May, 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman is proper compensation for his services for superintending said work, and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit."

[178] And your petitioner alleges that the evidence in said cause does not support the finding and determination of the Court that the sum of \$1,000 per month for the period of twenty months, as stated in said finding, was proper compensation for the services of said Lee Hoffman for superintending said work, and alleges that the sum of \$400 per month, and no greater amount, during said time is proper compensation for his said services, the same to be charged against the joint account in the settlement between the parties to the suit.

Second. That the Court erred in making the eighth finding of fact set forth in said decree, to-wit:

"8. That a full and true statement of the account between the parties hereto touching the work, material, and operations above mentioned and the moneys earned thereon, and showing

the moneys which the complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from

the city of Portland,

On Contract\$509,825.22

For Extra Work 14,496.74

\$524,321.96

Profits of camp, store, sale of live-

stock, interest, etc.....

15,339.76

Grand Total

\$539,661.72

Total gross cost of work, including

salary of \$20,000 to Lee Hoffman.....

434,622.13

Balance.....

\$105,039.59

[179] Amount retained by the city of Port-

land, on account of contract\$ 50,982.52

On account of extra work 2,263.43

53,245.95

Less amount paid to Wolff, Zwicker

& Buehner

18,627.17

Now held by city of Portland.....

\$ 34,618.78

Amounts drawn out by Lee Hoffman

and defendant.....

72,737.70

107,356.48

Amount to be paid to San Francisco

Bridge Co.....

2,316.89

Balance as above.....

\$105,039.59

One-half thereof owing complainant..

\$52,519.80"

That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant, is as follows, to-wit:

Total allowed and received from city of Portland.....	\$509,825.22	
For extra work	14,496.74	
		524,321.96
Profits of camp, store, sale of livestock, interest, etc		15,339.76
		<hr/> \$539,661.72
[180] Total gross cost of work, including salary of \$8,000 to Lee Hoffman		422,622.13
Balance.....		<hr/> \$117,039.59
A. C. F.....		117,039.59
Amount retained by city of Portland, on account of contract.....	\$ 50,982.52	
On account of extra work.....	2,263.43	
	<hr/>	53,245.95
Less amount paid Wolff, Zwicker & Buehner.....		18,627.17
		<hr/>
Now held by city of Portland.....		\$ 34,618.78
Amounts drawn out by Lee Hoffman and defendant.....		84,737.70
		<hr/> 119,356.48
Amount to be paid to San Francisco Bridge Co.....		2,316.89
		<hr/>
Balance as above.....		\$117,039.59
One-half thereof owing complainant...		58,519.80
Interest owing complainant at the rate of 8 per cent per annum to June 23, 1896, date of decree, as below.		
Interest on half of \$4,800, excess drawn for salary on December 30, 1893, from said date.....		476.80
[181] Interest on half of \$7,200, excess drawn for salary on September 30, 1894, from said date.....		498.40

Interest on half of \$8,855.04 drawn January 31, 1895.	494.91
Interest on half of \$40,000, drawn June 17, 1895.	1,628.66
Interest on half of \$10,000, drawn July 15, 1895.	375.51
Interest on half of \$13,882.66 drawn August 5, 1895.	490.45
Interest on \$2,316.89, advanced by complainant to December 30, 1893..	83.80
	<hr/>
	\$ 62,566.33
A. C. F.	62,566.33
Less interest on \$17,609.91 advanced by Lee Hoffman from the several dates of advances to November 1, 1893.	419.14
	<hr/>
	\$ 62,147.19

3rd. That the Court erred in decreeing that the costs of suit should be paid out of the common fund, and in not awarding to complainant judgment against defendant for his costs of suit.

[32] 4th. That the Court erred in the decree rendered wherein it was found and adjudged that the complainant recover judgment against the defendant for the sum of \$52,241.18, and that the Court should have found and adjudged that the complainant recover from the defendant the sum of \$62,147.19 and costs of suit.

Wherefore, the above-named complainant prays that the judgment and decree rendered by the above-entitled Circuit Court of the United States for the District of Oregon may be reversed or modified by the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that the complainant may have a decree in this cause awarding him a judgment against the defendant for the said sum of \$62,147.19, or such sum as the said United States Circuit Court of Appeals shall deem him to be equitable entitled to recover from the defendant, together with his costs of suit, and that the said Circuit

Court of the United States for the District of Oregon shall be directed to enter a decree in favor of the complainant in conformity with the decree and mandate of the said United States Circuit Court of Appeals.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

Service by copy admitted at Portland, September 19, 1896.

RUFUS MALLORY,
Of Solicitors for Defendant.

[Endorsed]: Filed September 19, 1896. J. A. Sladen, Clerk.

[183] And afterwards, to-wit, on Saturday, the 19th day of September, 1896, the same being the 138th Judicial day of the regular April term of said court—Present, the Honorable Charles B. Bellinger, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Last
Will of Lee Hoffman, Deceased,

Defendant.

Order Allowing Appeal of John McMullen.

The above-named complainant, John McMullen, having filed a petition in this court for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree rendered in this court and cause on the 23rd day of June, 1896, and the court having duly considered said petition, it is

Ordered that the appeal be allowed as prayed for upon the said complainant and appellant executing to the defendant and respondent a bond in the penal sum of one thousand

(\$1,000.00) dollars, with sureties to be approved by this Court.

Dated this 19th day of September, 1896.

CHARLES B. BELLINGER,

Judge.

[184] [Endorsed]: Filed September 19, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 19th day of September, 1896, there was duly filed in said court a bond on appeal of John McMullen, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Last
Will of Lee Hoffman, Deceased,

Defendant.

Bond on Appeal of John McMullen.

[185] Know All Men by These Presents, that we, John McMullen and Robert Wakefield, are held and firmly bound unto Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, in the sum of one thousand (\$1,000.00) dollars, to be paid to the said Julia E. Hoffman, executrix, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of September, 1896.

The condition of this obligation is such that,

Whereas, the above-named John McMullen has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse or modify the decree rendered in the above-entitled suit—

Now, therefore, the condition of this obligation is such that if the above-named John McMullen shall prosecute said ap-

peal to effect and answer all damages and costs, if he should fail to make the said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

JOHN McMULLEN, [Seal]
By L. B. COX, His Attorney.
ROBERT WAKEFIELD. [Seal]

State of Oregon, }
Multnomah County. } ss.

Robert Wakefield, being first duly sworn, deposes and says that he is a resident and householder within the State and district of Oregon; that he is worth the sum of two thousand (\$2,000.00) dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

ROBERT WAKEFIELD,

[186] Subscribed and sworn to before me this 19th day of September, 1896.

[Seal]

ROBERT R. REID, Jr.
Notary Public in and for Oregon.

The foregoing bond is approved this 19th day of September, 1896.

CHARLES B. BELLINGER,
Judge.

[Endorsed]: Filed September 19, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on Tuesday, the 29th day of September, 1896, the same being the 146th Judicial day of the regular April term of said court—Present, the Honorable Charles B. Bellinger, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix

} No. 2204.

Order Extending Time to File Transcript.

[187]

September 29, 1896.

Now at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant herein, it is ordered that the time heretofore allowed the said defendant in which to file the transcript of record in this cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended ten days.

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed September 29, 1896. J. A. Sladen, Clerk.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Complainant,

Defendant.

Stipulation as to Taking of Depositions.

[188] It is hereby stipulated and agreed that the depositions of George W. Catt and Henry S. Wood as witnesses on the part of the complainant in the above-entitled cause, may be taken before T. T. Daniels, Esq., a notary public in and for the city and county of New York, in the State of New York, at his office No. 29 Wall street, upon the interrogatories and cross-interrogatories hereto attached, the same when so taken, reduced to

Julia E. Hoffman, Executrix, etc.

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writing and duly certified to be received in evidence upon the trial of this cause, subject to all objections to be then taken as to materiality, relevancy, or competency.

Dated this 30th day of January, 1896.

L. B. COX,
Of Counsel for Complainant.
RUFUS MALLORY,
Of Counsel for Defendant.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of J. E. Hoffman, Deceased,

Defendant.

Interrogatories to George W. Catts.

[189]

Counsel for complainant in the above-entitled cause, subject to the ruling of the Court upon the evidence introduced by the defendant touching matters in controversy herein which transpired prior to the execution of the contract, complainant's Ex. No. 1, propounds these questions to the witness George W. Catt.

Interrogatory 1. State your name, age, residence, and occupation.

Interrogatory 2. What connection, if any, have you with the San Francisco Bridge Company of San Francisco, California, and how long has your relationship with that company existed?

Interrogatory 3. State whether or not you have any information in regard to the San Francisco Bridge Company or Mr. John McMullen, its general manager, bidding on certain work let by the water committee of the city of Portland, Oregon, on

the first day of March, 1893, for the purpose of bringing Bull Run water to the city of Portland.

Interrogatory 4. State what, if anything, you had to do with preparing any estimates or securing any information or data which were to be used for forming an estimate as to that portion of the work which was let as a separate item under the head of "manufacturing and laying steel pipe from the headworks to Mt. Tabor." State generally and fully what you did in this connection.

Interrogatory 5. I show you herewith a copy of a paper which has been introduced in evidence by the defendant, marked [90] "Defendant's Ex. Y2, G. A. B. Ex.," the original of which purports to be a compilation of figures made by you touching the work last referred to, and will ask if you recognize this as a compilation prepared by yourself.

Interrogatory 6. If you shall answer the foregoing interrogatory in the affirmative, I will ask you to state what said compilation was designed to cover, that is to say, whether it was your purpose that it should be used as prepared as the basis of a bid on said work, or whether it related to your estimate as to the cost for which the work should be done only.

Interrogatory 7. Please state what you did, or were required to do by the San Francisco Bridge Company or by Mr. McMullen, in connection with this work referred to, and what any reports rendered by you to the San Francisco Bridge Company or to McMullen were designed to cover, and what office they were designed to perform.

Interrogatory 8. I show you another paper consisting of three pages which is a copy of another document which purports to be a copy made by one H. D. Bush of certain computations made by you in connection with this same work. This paper is marked "W2, W2 page 2, and W2 page 3." State whether or not this is a copy of any computation you may have made in connection with this work and if so, what the purpose of the computation was and what office it was designed to fill.

Interrogatory 9. State fully what, if anything, you did in aid of the execution of the work of manufacturing and laying [91] steel pipe from the headworks on Bull Run to Mt. Tabor after

the contract therefor between the water committee and Hoffman had been entered into, and at whose instance you acted

L. B. COX,

Of Counsel for Complainant.

No cross-examination.

DOLPH, MALLORY & SIMON,

Atty's for Deft.

Copy of Catt's Estimate on Plant—Bull Run. W.2.

For 20 sections 30 ft. long—120 sheets per day.

4 punches	8,000
2 Planers	3,000
2 Bending Rolls (each bend 6 plates per hour).....	3,000
12 Yale and Towne Cranes	3,000
3 Riveters complete with Pumps, cranes, etc. (to run night and day).....	16,000
2 Forges	100
1 Small Punch and Shear	1,500
1 Drill Press	200
1 Lathe	200
Shafting	1,000
Car Track and Overhead Tramway	1,200
Engine	2,000
Boilers	3,000
Electric Light	1,000
Incidentals	1,000

44,200

Transportation to Portland 5,000 |

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Dipping plant 3,000 |

Hoisting Engine for same.. .. 5,000 |

Shop Buildings 10,000 |

67,200

Bull Run.

W.2 p.2

Catt's Estimate of Cost of Riveted Pipe, 20 sections—
about 50,000 lbs. per day.

Total men to operate tools, to deliver the pipe per day
ready for calking, 60 @ \$2.50 per day average...150.00
Coal and Oil 25.00 |

Cost of rivets over price paid for finished pipe	60.00
Engineer and fireman	15.00
Shops, Superintendents and Supplies per day	50.00

Making a total per day of	300.00	
		per pound
\$300 per day for 50,000 lbs.—per pound for pipe ready for calking .....		.006
Calking .....		.0005
Dipping and Testing .....		.0015
Contribution toward cost of plant	\$36000.00	.003
Superintendence and incidentals	\$18000.00	.0015
Making a total of .....		.0125
Riveting on field .....		.002
Hauling .....		.0025
Profits	\$80500.00	.007
Or bid for pipe in the ditch .....		.024
3] We did bid .....		.0275

Bull Run Pipe Line

W2, page 3

Copy of Catt's Estimate for Manufacture and Laying.

	Catt's Prices	Estimate Amounts
Plates 11442000 lbs.		
Rivets 340000		
Manuf. and laying 11782000 lbs@.	\$.024	\$282768.00
Manholes 255 @	30.000	7500.00
Air Valves 34 @	10.000	340.00
Bends Extra Joints 200@	20.000	4000.00
Blow-offs with 6" valves 46	10.000	460.00
Waste Pipes 6" 29,000 lbs .....	.060	1740.00
Brick laid in cement 580 M	16.00	9280.00

Two Stand Pipes.

Plates	15,000 lbs.	.060	900.00
Water Gates 36"	1	75.000	75.00
Water Gates 33"	1	75.000	75.00

Julia E. Hoffman, Executrix, etc.

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Water Gates 30"	2	75.000	150.00
Waste Pipe 30"	40,000 lbs.	.060	2400.00
Foundation Concrete	60 yds.	12,000	720.00

Sleeve Joints.

Wr't Iron—7	7000 lbs.	.100	700.00
Lead	3000 lbs.	.060	180.00

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Trestles.

Wr't Iron	7000 lbs.	.060	2400.00
Concrete	400 yds.	12.00	4800.00
Total without Excavation			318,638.00

Excavation and Refilling.

Earth	270,000 yds.	.33 1-3	90000.00
Loose Rock	10,000 yds.	.500	5000.00
Solid Rock	2,000 yds.	1.200	2400.00

 97400.00

 Grand Total.....\$416038.00

BID "D.D.D."

Ex. Y. 2.

Manufacturing and Laying.

G.A.B. Ex.

28	{Steel, 11,442,000 } {Rivets 340,000}	11,782,000	\$.024	\$282,768.00	
29	Manholes.....	255	30.00	7,650.00	
30	Air Valves.....	34	10.00	340.00	
31	Bends, extra joints..	200	20.00	4,000.00	
32	Blow-offs, with 6-inch valves.....	46	10.00	460.00	
33	Waste Pipes, 6-inch.	29,000	.06	1,740.00	
33½	Brick laid in cement	580,000	16.00	9,280.00	\$306,238.00
34	Steel Plates.....	15,000	.06	900.00	
35	Water Valves, 36-in.	1	75.00	75.00	
36	Water Valves, 33-in.	1	75.00	75.00	
37	Water Valves, 30-in.	2	75.00	150.00	
38	Waste Pipe, 30-in..	40,000	.06	2,400.00	
39	Foundations—				
	Concrete or cement	.60	12.00	720.00	4,320.00
[195] 40	Wrt. iron sleeves..	7,000	.10	700.00	
41	Lead.....	3,000	.06	180.00	880.00
42	Wrought iron	40,000	.06	2,400.00	
43	Foundat'ns, concrete	400	12.00	4,800.00	7,200.00
44	Earth.....	270,000	.33½	90,000.00	
45	Loose Rock.....	10,000	.50	5,000.00	
46	Solid Rock.....	2,000	1.20	2,400.00	97,400.00
Total cost Bid "D.D.D."					\$416,038.00

Julia E. Hoffman, Executrix, etc.

139

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Defendant.

Interrogatories to Henry S. Wood.

Subject to the ruling noted above as to evidence offered by the defendant touching matters connected with the subject of this suit which occurred prior to the execution of the contract, Complainant's Ex. No. 1, the complainant addresses these inquiries to the witness Henry S. Wood.

[196]

Interrogatory 1. State your name, age, residence and occupation.

Interrogatory 2. What connection have you, if any, with the San Francisco Bridge Company of San Francisco, California, and if you have such connection, how long has it continued?

Interrogatory 3. Do you know anything about the letting to bids by the water committee of the city of Portland, Oregon, of the work of bringing Bull Run water to that city on the first day of March, 1893?

Interrogatory 4. If your answer the last interrogatory in the affirmative, I will ask you to state what, if anything, you had to do in connection with said letting and on whose behalf, or at whose instance, you performed whatever service you may have performed. State fully just what you did.

Interrogatory 5. I show you a paper of two pages marked Defendant's Ex. U2 and V2, which has been offered in evidence as a copy of a copy of a computation made by you in connection with this work, and ask if you recognize this as any computation of your own.

Interrogatory 6. If you answer the last interrogatory in the affirmative, I will ask you to state what the purpose of this computation was, that is to say, whether it was designed for

a bid on any portion of the work or as an estimate of the cost price of doing the work.

Interrogatory 7. State who, if any one, was engaged in gathering information and compiling the same for the San Francisco Bridge Company, or John McMullen, its general manager, touching the manufacture and laying the steel pipe on this water system from the head works to Mt. Tabor.

Interrogatory 8. In connection with the matters covered by the preceding interrogatory, I will ask you to state whether or not any bid for this portion of the work was prepared or agreed upon in form to be submitted by the San Francisco Bridge Company or McMullen prior to the visit of the latter to Portland, shortly before the letting took place.

Interrogatory 9. State what the proposition was in connection with this bidding upon which you were engaged in San Francisco as to a bid which was to be submitted by San Francisco Bridge Company or McMullen in connection with Lee Hoffman, that is to say, the manner in which they were to bid upon the work.

Interrogatory 10. State fully what, if anything, you did in aid of the execution of the work of manufacturing and laying steel pipe from the head works on Bull Run to Mt. Tabor after the contract therefor between the water committee and Hoffman had been entered into, and at whose instance you acted

L. B. COX,

Of Counsel for Complainant.

No cross-examination.

DOLPH, MALLORY & SIMON,

Att'y for Defendant.

11945

Ex. U 2

PORTLAND WATER WORKS.

Bid "A"—Head Works.

	RATES		BID		TOTAL COST	PROFIT	BID
	COST		\$				
Clearing and grubbing 2 acres, at	\$125				\$ 250	\$ 55	\$ 605
Trees cut—100 trees	3				300		
Excavations:							
Earth—3,000 cubic yards, at .....	.50				1,500		
Loose rock—1,000 cubic yards, at	1.50				1,500		
Solid rock—7,000 cubic yards, at	1.50				10,500		
Rock under water—100 cubic yards, at	10.00				1,000	1,450	15,950
						1,505	16,555
					15,050		

Bid "A" [See Act. No. 7 Spec.] certified check No. 850 to 1200.

Bid "B"—for Wrought Iron:

Wrought iron, 11,442,000 lbs., F. O. B. Mill, at	\$.02		\$ 228,840		\$		\$
Freight on " " at .....	.0107		122,429				
Inspection, insurance and inc., at			731		352,000	352,000	387,200
							387,200

Bid "B" [See. Act. No. 7 Specif.] certified check \$19,500 to \$22,000.

Bid "C"—Manufacturing and Laying:

Receipt and storage 11,442,000 lbs. at	\$.0005		\$ 5,721		\$		\$
Insurance, rejections, inc. at .....	.0005		5,721				
Plant, assumed cost for 25 lengths per day, at .....	.0005		28,905				
Pay-roll—punch, bend, riv. and caulk, at .....	.00375		42,908				
Fuel, Oil—supplies, at .....	.0005		5,721				
Dipping, " " .....	.002		22,884				
Testing (25 lengths per day), at .....	.0005		5,721				
Transportation to trench, at .....	.00125		14,303				
Laying and riveting, at .....	.003		34,326				
	.0025		28,005				
					194,515	19,450	213,965

Total iron, 1,144,200 lbs., fin. on ditch, per lb. 1.87

Rivets, 342,000 lbs., at per lb.....	\$ 3.9	\$.....	\$ 13,338	\$ 1,334	\$ 14,672
Manholes, 225, at each.....	20	.....	4,500	450	4,950
Air valves (4 inches), 54, at each.....	10	.....	540	54	594
Bends, extra joints 200, at each.....	30	.....	6,000	600	6,600
Blow-offs (with 6-inch valves), 46, at each.....	10	.....	460	.....	.....
Waste pipes, 23,000 lbs. (labor only), at per lb.....	.02	.....	580	.....	.....
Waste pipes, 580 lbs., brick in cem., per lb.....	16	.....	9,280	1,082	11,362
Two-stand pipes, labor on 15,000 lbs., at.....	\$.02	\$.....	\$.....	\$.....	\$.....
Four gates, at each.....	.150	.....	600	.....	.....
Labor on 40,000 lbs., at per lb.....	.02	.....	800	.....	.....
Concrete, 60 yds., at.....	10	.....	600	230	2,530
Sleeve joints—7,000 lbs. wrought iron, at per lb.....	.06	.....	420	.....	.....
3,000 lbs. lead, at per lb.....	.06	.....	180	60	680
Trestles (all cast) of 40,000 lbs. wrought iron, at per lb.....	.06	.....	2,400	.....	.....
400 yds. concrete, at per yd.....	10	.....	4,000	640	7,040
Total for all but excavating and refilling.....	\$ 2.085	\$2,293	\$238,513	\$23,850	\$262,363

PORTLAND WATER WORKS.

Bid "C" Continued.—Mfg. and Laying.

	Rates		Cost	Bid	Cost	Profit	Bid
	\$	\$					
Br. forward [all est. but Excav. Refill].....							
Excav. and Refilling.....				.33	81,000		
Earth, 270,000 yards, at.....		.30		1.65	15,000		
Loose Rock, 10,000 yards, at.....		2.00		2.20	4,000	100,000	110,000
Solid Rock, 2,000 yards, at.....					100,000		
					338,513	38,850	372,363
Total bid "C" [see act. No. 7 spec.].....		2,958		3,255			
Certified check \$19,000 to \$22,000							

Bid "E"—Cast I. Mt. Labor to City Park.

	Cost	Bid	Cost	Profit	Bid
Cast Pipe—6,300 [short] tons at Fon. Fast.....	21.50		135,458		
6,300 [short] tons Ins. and Frt.....	8.50		53,550		
6,300 [short] tons, local handlings.....					
Laying and etc., 6,300 [short] tons jointing.....	10.00		63,000	18,900	207,900
Manholes, 15, 30,000 lbs., at lb.....	.04		1,200	6,300	69,300
Blowoffs, 6 blowoffs, 1,200 lbs., at.....	.06		780	120	1,320
6 Wt. I. wastes, 1,200 lbs., at.....	150.00		900		
6 Water valves, 5 at.....	10.00		50	201	2,211
Air valves [4 inches] 10 at.....	.04		40	10	110
Bends—Cast iron, 20,000 lbs., at.....				80	880
Excav. and refilling.....					
Earth, 40,000 yards, at.....	.30		12,000		
Loose rock, 4,000 yards, at.....	1.50		6,000	1,200	13,200
Solid rock, 1,000 yards, at.....	2.00		2,000	600	6,600
Excav. Solid, per ton.....				200	2,200
Bid "E" [see Act. No. 7, spec.].....	43.82	48.20		27,611	308,721
Certified check 15,500 to 17,000					

[202] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Defendant.

Depositions.

Of HENRY S. WOOD and GEORGE W. CATT, as witnesses on the part of the complainant in the above-entitled cause, taken before me, Thomas F. Daniels, a notary Public in and for the city and county of New York, in the state of New York, at my office No. 29 Wall street, pursuant to the annexed stipulation, to be read as evidence on behalf of the complainant on the trial of the above-entitled cause, said depositions being taken by me at the times stated in said depositions.

Deposition of Henry S. Wood.

In the case in equity of John McMullen vs. Julia Hoffman, executrix of the will of Lee Hoffman, deceased, in the Circuit Court of the United States for the District of Oregon.

[203] Deposition taken before T. F. Daniels, Esq., N. P. in and for the city and county of New York, state of New York, at his office at 29 Wall St., this seventh day of February, 1896.

Interrogatory 1. State your name, age, residence and occupation.

Answer 1. Henry S. Wood, age 35; residence, Belvedere, Marin Co., Cal.; occupation, civil engineer.

Interrogatory 2. What connection have you, if any, with the San Francisco Bridge Co. of San Francisco, California, and if you have such connection how long has it continued?

Answer 2. I have been estimating and designing engineer for the above company, which position I have held since September, 1887, up to the present time.

Interrogatory 3. Do you know anything about the letting to bids by the water committee of the city of Portland, Oregon, of

the work of bringing Bull Run water to that city on the first day of March, 1893?

Answer 3. I do.

Interrogatory 4. If you answer the last interrogatory in the affirmative, I will ask you to state what, if anything, you had to do in connection with said letting and on whose behalf or at whose instance, you performed whatever service you may have performed? State fully just what you did.

Answer 4. On behalf and at the instance of John McMullen, president of the San Francisco Bridge Co., and Lee Hoffman, I made several estimates and inquiries concerning the cost of the different items on the Bull Run waterworks contract prior to the letting of said contract as above mentioned. In this connection I interviewed all people possessed of special information, who seemed available, in the city of San Francisco, such as Hermann Schussler, chief engineer of the Spring Valley Water Works, and Mr. Todd, who was manager at or before that time of a riveted iron pipe works in Pomona, California. I also consulted what literature was available on the subject; and as a consequence of my investigation made two or three preliminary estimates of cost.

I acknowledge Exhibit U2 and V2 as being (as far as I can remember at this distance from my records) a copy of the last estimate made by me before the departure of said John McMullen for Portland, Oregon, to bid upon said work. No bid made by me at any time was intended to be final for the use of said John McMullen and Lee Hoffman, as it was definitely understood that a similar preliminary estimate was to be independently made by George W. Catt, of New York, which was to contain the experience of Clemens Herschel, chief engineer of the Jersey City pipe line; and also a third estimate was to be independently made by the engineer of Hoffman and Bates, of Portland, Oregon. With this full knowledge I made the rapid and approximate sheets Exhibit U2 and V2, and carried out, for the sake of comparison, an assumed profit of ten per cent, to see what the figures would amount to as a possible bid, in order that certified checks in several amounts might be drawn to accompany said John McMullen to Portland. Exhibit U2 and V2 plainly show the wide latitude which this estimate required, as bid "A" is noted as requiring a check of from \$850.00

to \$1200.00; bids "B" from \$19,500.00 to \$22,000.00; bid "C" from \$9000.00 to \$22,000.00; bid "E" from \$15,500.00 to \$17,000.00; bid "F" and "G" not noted. I was informed before making this Exhibit U2 and V2 that the items of the three estimates, including this, were to be reviewed by our Seattle engineer, Mr. J. B. C. Lockwood, and by the engineer of Hoffman and Bates in Portland, and by the principals, John McMullen and Lee Hoffman, and each individual item checked one with the other, and that which seemed most reliable in the light of such comparison to be used in the final estimate and bid, and I understood, and still understand, that these comparisons were so made, and that such final estimate there resulted. After refreshing my memory by reading a letter written by me March 17th, 1893, to George W. Catt, New York, I find that we figured at that time on manufacturing our pipe by creating a plant which used our "Colusa" excavator engines and other miscellaneous plant in our possession; part of said work to be sublet to or to be under the supervision of Mr. Todd, of Pomona, Cal., mentioned before in this deposition, and using power riveters on longitudinal seams only. I also stated in that letter that the fittings and miscellaneous items in my final estimate taken by Mr. McMullen to Portland were figured high, except that the "gates" were guessed at (it turned out to be too low). After the award of contract and the subletting of the shop manufacture of the pipe to Wolff and Zwicker of Portland, there was little for an office engineer at San Francisco to do in relation to this contract, and in the same letter to which I above referred I stated to George W. Catt, and then and now believe, that said Lee Hoffman refused to buy out the interest of John McMullen, "because he wanted our advice, assistance and Foy" (meaning that our Mr. Foy was to be the active field superintendent and organizer of pipe line forces), and Mr. Foy actually became the active representative of our office in the execution of said contract. And while there may have been some incidental correspondence and consultation between Mr. Foy and myself concerning details of plant and management, I cannot at this date recollect definitely.

[206] Interrogatory 5. I show you a paper of two pages marked Defendant's Ex. U2 and V2, which has been offered in evidence as a copy of a computation made by you in connection

with this work, and ask you if you recognize this as any computation of your own?

Answer 5. I do, as above stated and explained.

Interrogatory 6. If you answer the last interrogatory in the affirmative, I will ask you to state what the purpose of this computation was, that is to say, whether it was designed for a bid on any portion of the work or as an estimate of the cost price of doing the work.

Answer 6. It was in no sense designed as a bid on the work, but, as explained, for the purpose of drawing checks to be used in the bid. It was an estimate of the cost price of doing the work in my opinion, subject to being checked by two other estimates, as explained.

Interrogatory 7. State who, if any one, was engaged in gathering information and compiling the same for the San Francisco Bridge Co., or John McMullen, its general manager, touching the manufacture and laying of steel pipe on this water system from the head works to Mt. Tabor.

Answer 7. To my personal knowledge, gained from access to correspondence on the subject, I would state that Mr. Todd, of Pomona, above mentioned, George W. Catt, of New York, above mentioned, Clemens Herschel, of New York, above mentioned, and myself, were so engaged.

Interrogatory 8. In connection with the matters covered by the preceding interrogatory, I will ask you to state whether or not any bid for this portion of the work was prepared or agreed upon in form to be submitted by the San Francisco Bridge Company or McMullen prior to the visit of the latter to Portland, shortly before the letting took place.

Answer 8. No bid was prepared or agreed upon to be submitted at the letting, or for any other purpose than for preliminary comparison and the drawing of proper certified checks, as above explained.

Interrogatory 9. State what the proposition was in connection with this bidding upon which you were engaged in San Francisco as to a bid, which was to be submitted by the San Francisco Bridge Company or McMullen in connection with Lee Hoffman; that is to say, the manner in which they were to bid upon the work.

Answer 1. It was understood, as result of a visit of Lee Hoffman to San Francisco, before the letting, and as a result of conferences between him and John McMullen, at some of which conferences I was present, that said Hoffman and McMullen were to bid together upon the work for mutual assistance, advice and profit, and at no time was it considered probable that the San Francisco Bridge Company could or would bid alone upon said work with the intention of taking said work; to that end, in order to save time and clerical error, I filled out one or more bidding blanks for said letting in light pencil with figures representing my rough estimate of what it would be proper to bid subject to above explained checks and comparisons, and filled in the signature blanks with the names both of John McMullen and Lee Hoffman, thus indicating clearly my understanding that they were to be associated in the bid intended to take the contract. I also stated in the letter of March 17, 1893, to George W. Catt, above referred to, that "Hoffman won't listen to it" (meaning the selling out of our interest in the contract to Hoffman) "out of regard for McMullen, and also because he wants our advice and assistance and Foy." This correctly represents the attitude taken by Hoffman at that time, and before the letting, and of which I was cognizant, as a participant in interviews between said Hoffman and McMullen.

[209] Interrogatory 10. State fully what, if anything, you did in aid of the execution of the work of manufacturing and laying steel pipe from the head works on Bull Run to Mount Tabor after the contract therefor between the water committee and Hoffman had been entered into, and at whose instance you acted.

Answer 10. As above explained, little was done or required of me after the contract had been let to Hoffman and the subcontract for the shop manufacture of the pipe had been let to Wolff and Zwicker, of Portland, as most of my executive functions would have been connected with the design and establishment of a plant of our own had we built one, as assumed in our preliminary estimates. The transportation having also been sublet, there remained but the field work, which was in charge of our competent specialist, Mr. Hugh Foy, and this distribution of executive responsibility practically relieved me of further responsibility or usefulness in the execution of the

contract. I did some work of investigation with Mr. Todd, of Pemona, however, in the matter of the field riveting and laying of the pipe, but no use was made, that I can remember, of the results of such examination.

And further deponent saith not.

H. S. WOOD,

Subscribed and sworn to before me this 7th day of February, 1896.

[Seal]

THOS. F. DANIELS,

Notary Public, N. Y.

Continued from day to day and finally adjourned to February 24, 1896, at the same place, 11 A. M.

T. F. D.

N. P.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Defendant.

Deposition of George W. Catt.

29 Wall Street,

New York, February 24, 1896, 11 A. M.

GEORGE W. CATT, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, deposes and says as follows:

Interrogatory 1. State your name, age, residence and occupation.

To the first interrogatory he saith: My name is George William Catt, I am thirty-five years of age, and I reside in the city of Brooklyn, county of King, and State of New York.

Interrogatory 2. What connection, if any, have you with the San Francisco Bridge Company of San Francisco, California and how long has your relationship with that company existed?

To the second interrogatory he saith: In the early part of the year 1887 I entered the employ of the San Francisco Bridge Company, of San Francisco, California, as chief engineer, and continued to be thus employed until 1889. In 1889 the San Francisco Bridge Company opened a branch office at Seattle, in the State of Washington. At or about this time I was elected vice-president of the San Francisco Bridge Company, and, in addition to the duties of engineer in chief, there was also given into my charge and management all of the business of the San Francisco Bridge Company within the States of Oregon, Washington, Idaho and Montana. This position I held until 1892 (February), at which time the San Francisco Bridge Company decided to open a branch office in New York City, in the State of New York, for the conduct of its business on the Atlantic Coast. On the opening of the New York office, I was transferred to that office, and the management of all the business of the San Francisco Bridge Company on the Atlantic Coast was placed under my direction. I still held the position of vice-president and engineer in chief of the San Francisco Bridge Company. I continued to hold these offices and to act as manager of the Atlantic Coast business of the San Francisco [212] Bridge Co. until December, 1893. In December, 1893, I resigned the position of vice-president and also the office of chief engineer. In December, 1893, the San Francisco Bridge Company sold its business on the Atlantic Coast to another company and I became president, manager and engineer of that company. Since the San Francisco Bridge Company disposed of its business on the Atlantic Coast, my connection with the San Francisco Bridge Co., has been mostly that of consulting engineer upon such matters as they may deem it advisable to secure my advice. I still act in this capacity for them.

Interrogatory 3. State whether or not you have any information in regard to the San Francisco Bridge Company, or John McMullen, its general manager, bidding on certain work let by the water committee of the city of Portland, Oregon, on the first day of March, 1893, for the purpose of bringing Bull Run water to the city of Portland.

To the third interrogatory he saith: Soon after I had undertaken the management of the business of the San Francisco Bridge Company for the States of Oregon, Washington, Idaho

and Montana, Lee Hoffman, of Portland, Oregon, then proprietor and manager of the business conducted under the firm name of Hoffman and Bates, approached me in reference to the San Francisco Bridge Company and that firm joining forces for the building of the contemplated "Bull Run" waterworks for the city of Portland, Oregon. Lee Hoffman and I had several conferences concerning such a union of the two concerns for this work. In 1891, Mr. Lee Hoffman and I journeyed together from Spokane, Washington, to Tacoma, Washington, via the N. P. R. R. During this journey Lee Hoffman and I arrived at a basis of agreement by which the S. F. B. Co. should unite with Hoffman & Bates in the construction of the "Bull Run" waterworks, in case either of us secured from the city of Portland, Oregon, the contract for building said works. The essential point of that agreement was, that the work should be executed by us jointly for the joint account of the two companies, and the two companies should share alike in all losses or profits that might result from such contract for building the "Bull Run" waterworks. It was a general understanding between us, the details of the agreement being left to be settled when a contract was obtained. This arrangement was often referred to by Lee Hoffman, between time of making of it and time of my departure for the management of the San Francisco Bridge Company's business on the Atlantic Coast. It was also agreed between Lee Hoffman and myself that I should make such investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make such investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make some investigation during the year 1891, by correspondence with manufacturers of tools, etc., also visited the Albion Iron Works of Victoria, B. C., which was at that time manufacturing some pipe of this character. I advised the San Francisco Bridge Company at San Francisco, through Mr. McMullen, of this arrangement with Lee Hoffman, and when the work was advertised for the city of Portland, Oregon, in 1893. In making my estimate for the work mentioned I addressed some of them to J. McMullen and Hoffman & Bates jointly. The agreement was that J. McMullen should collect what informa-

tion he could at San Francisco, California, with the assistance of the engineering force of the San Francisco Bridge Company there concerning the proposed work. He was to take such information with him to Portland, Oregon, where he would meet with Lee Hoffman, who would have secured such information as he could on the same subject modified by his more accurate information of the local conditions, and that what information I could secure by investigation in the east would be forwarded to Lee Hoffman and J. McMullen, of Portland, Or., and that after they had made a comparison of all information collected, they should agree upon the amount to be bid for the work jointly.

Interrogatory 4. State what, if anything, you had to do with preparing any estimates or securing any information or data which were to be used for forming an estimate as to that portion of the work which was let as a separate item under the head of "Manufacturing and Laying Steel Pipe from the Head Works to Mt. Tabor." State generally and fully what you did in this connection.

[215] To the fourth interrogatory he saith: About February 1st, 1893, I received notice in New York City, New York, that the city of Portland, Oregon, had advertised for bids for the construction of the "Bull Run" pipe line, and notice from the San Francisco Bridge Company that I was, first, to investigate in the most thorough manner possible, and report to Hoffman & McMullen, at Portland, Oregon, before March 1st, 1893, concerning the proper and requisite plant and cost of same for the manufacture of such pipe. Second, to investigate as fully as possible the cost of manufacturing such pipe, and laying of the same. Third, to investigate and get the lowest prices possible for the several items of material required in the construction of the pipe line. I had substantially the same request from Hoffman & Bates.

In order to comply with the first request, I, in connection with two assistants, made several trips to shops that had had some experience in the manufacture of riveted pipe, particularly to the shop of McKee & Milson, Patterson, N. J., in whose shop some 30 miles of 48 inch pipe had been manufactured for the east Jersey Water Co. Also visited shops in Pittsburg and other places. I had conferences and correspondence with some

twelve or more manufacturers of such tools as would be required. After advice from San Francisco Bridge Co., and approved by Hoffman & Bates, I employed as an expert Clemens Herschel, chief engineer of the East Jersey Water Company, who had charge of the building of their pipe line, recently constructed. I had a conference with the superintendent of McKee & Milson's shops. As a result of this investigation, I made a report to Hoffman and McMullen, in which I gave the information I had obtained, together with a plan of a suitable shop for the manufacture of the pipes required, for the "Bull Run" line. Also an estimate of the cost of the same.

I pursued the same system in determining the probable cost of manufacturing and laying the pipe, except that it was often with different people from those I had communicated with, in reference to shop and tools. I investigated every possible source of information that was available.

Third, I communicated by correspondence with every manufacturer of each different item of material required in the construction of the "Bull Run" pipe line that I knew of, and I had a personal conference with every one of such persons it was possible for me to see. On all of these matters I made reports from time to time to Hoffman and McMullen, at Portland, Oregon. To reach a correct estimate and to avoid the possibility of error, I carefully arranged by number the several items included in the proposal found at the end of the specifications issued by the city of Portland for the "Bull Run" water supply. Beginning with (1) for the item of "clearing and grubbing" in line 7 of page 72 of specifications, and numbering continuously to item 26 on line 11 of page 73, "solid rock." Beginning again with 27 for item "steel," line 5, on page 74, continuing consecutively and regularly until the last item on page 75 "earth" was given. No. 68, except that there was given 6½ to item "wrought iron," on page 72, and a new item added numbered 33½, "bricks laid in cement," to correspond in the "steel bid" for item 13 in "iron bid," and further, inasmuch as the specifications had designated each class of items that were to be bid on together, as "Bid A," "Bid B," etc., to "Bid G," and had omitted to make any designation for the class items under the head of "steel" I added the class "bids for steel," designating them as "Bid DD" and "Bid DDD." In making my reports I

designated them as reports on "Bid A," "Bid C," "Bid DD" or "Bid G," as the case might be. This was to avoid confusion, and was following the system used in the specifications.

These several reports, beginning about Feb. 10th, 1893, and continuing until Feb. 28th, 1893, and finishing with a telegraphic report which materially modified much that had been forwarded earlier, were sent as my estimates of the cost of doing the work. They comprised in all some 25 or 30 separate reports. In making these investigations I wrote at least one hundred and fifty letters, and interviewed altogether not less than one hundred persons. I wrote numerous letters also to Mr. McMullen and Hoffman & Bates, prior to the bidding on March 1, 1893. From about Feb. 5th, 1893, until about March 15th, 1893, the entire office force of the San Francisco Bridge Co., in New York, was employed exclusively on the work of investigating and forwarding the information secured to Mr. McMullen and to Hoffman & Bates concerning the "Bull Run" pipe line. The actual expense account of the office force of the San Francisco Bridge Company, at New York, at this time was \$1,050.00 per month. There were many additional expenses occasioned by the investigations and reports mentioned.

Interrogatory 5. I show you herewith a copy of a paper which has been introduced in evidence by the defendant, marked "Defendants Ex. Y2 G. A. B. Ex.," the original of [218] which purports to be a compilation of figures made by you touching the work last referred to, and will ask if you recognize this as a compilation prepared by yourself.

To the fifth interrogatory he saith: I have refreshed my memory by reading my letter-press copies of all the reports I made on the "Bull Run" pipe line. "Ex. Y2, G. A. B. Ex." is part of a schedule of estimates of cost accompanying one of my reports, but is not all of the schedule, and some of the items are not the same as in my report. The original (of which this is a copy) is headed "Portland Water Works Estimate."

Interrogatory 6. If you shall answer the foregoing interrogatory in the affirmative, I will ask you to state what said compilation was designed to cover, that is, to say, whether it was your purpose that it should be used as prepared as the basis of a bid on said work, or whether it related to your estimate as to the cost for which the work should be done only.

To the sixth interrogatory he saith: I have not answered interrogatory 5 in the affirmative, but I will state that my original compilation (of which the said exhibit Y2 purports to be a copy, but was not) was designed to cover my estimate of the cost of the items mentioned in said compilation, but was subject to correction on further information, which I was endeavoring to obtain; and it was so corrected and it was intended to be used by Hoffman and McMullen in enabling them to judge as to what would be a proper and safe bid to make for that portion of the "Bull Run" pipe line.

19] Interrogatory 7. Please state what you did, or were required to do by the San Francisco Bridge Company or by Mr. McMullen, in connection with this work referred to, and what any reports rendered by you to the San Francisco Bridge Company or to McMullen were designed to cover, and what office they were designed to perform.

To the seventh interrogatory he saith: The estimate headed "Portland Water Works Estimate" was designed to cover the items named therein, and was my report of the estimated cost of the work, based on the information I then had, and was subject to correction in future reports; and it was thus corrected. The report, of which this is a partial and somewhat incorrect extract, was made Feb. 21st, 1893, and was the first general report made. There were some ten or twelve reports made after it. They were all of them intended to aid McMullen and Hoffman in making up a bid for the "Bull Run" pipe line works, and embodied my estimate of the cost. It was not intended as a bid, the letter which accompanied it called it an estimate. The several parts of it were called "bids" because that was the designation given them in the specifications. They were, however, in no sense bids or tenders for the work, nor were they intended as such. Throughout my reports such expressions as these frequently occurred:

220] "My estimate item No. is only approximate, you best check this carefully"; or, "This is my estimate, you may think differently."

The actual amount of this bid to be put in was to be determined at Portland, Oregon, by the representatives of the two concerns. My estimates were to aid these representatives in arriving at a proper and safe bid to make for the work.

Interrogatory 8. I show you another paper consisting of three pages, which is a copy of another document which purports to be a copy made by one H. D. Bush of certain computations made by you in connection with this same work. This paper is marked "W2, W2 page 2. and W2 page 3." State whether or not this is a copy of any computation you may have made in connection with this work, and if so, what the purpose of the computation was and what office it was designed to fill.

To the eighth interrogatory he saith: The sheet marked "W2" is a part of a letter containing one of my reports on the probable cost of a plant suitable to manufacture the riveted pipe required for the "Bull Run" pipe line, and is a correct compilation from the report. It was intended to give McMullen and Hoffman my idea of the plant required and the cost of the same; it was not final, nor was it to be followed literally. Sheet "W2, page 2," is not a copy of any information by report or otherwise of anything I sent to McMullen and Hoffman at Portland, Oregon, or elsewhere. Some of the items not to be found in some of my reports. Some of the items are not to be found in any of my reports. Sheet three or "W2, page 3," is not a copy of any work that I did in connection with the "Bull Run" pipe line, or any other work.

[221] Interrogatory 9. State fully what, if anything, you did in aid of the execution of the work of manufacturing and laying steel pipe from the head works on "Bull Run" to Mt. Tabor after the contract therefor between the water committee and Hoffman & Bates had been entered into, and at whose instance you acted.

To the ninth interrogatory he saith: As soon as I was advised by telegraph that the contract for building the "Bull Run" pipe line had been awarded to Hoffman & Bates, I secured further interviews with Mr. Clemens Herschel with reference to the difficulties that were encountered in the work of building the East Jersey Water Co.'s line. The information I obtained concerning the shop and field work, rivets in field, hand holes, fittings, loose joints, etc., I communicated to Hoffman and Bates, and also to Mr. McMullen, and I continued to advise with both, Mr. McMullen and Hoffman & Bates with reference to the execution of the work until about September

1st, 1893. Among other things I, at the request of Hoffman & Bates made some investigation about tools for field work, and as a result secured and sent forward some tools for the work. I also, at the request of Hoffman & Bates, made investigation about men for the work, by interviews in New York, and by correspondence with parties in Philadelphia and Pittsburg, Penn., of all of which I advised Hoffman & Bates, as well by telegrams as by letters.

And further deponent saith not.

GEO. W. CATT.

222] Subscribed and sworn to before me this 24th day of February, 1896.

[Seal]

THOS. F. DANIELS,
Notary Public, N. Y.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Defendant.

State of New York,
County of New York.

} ss.

Certificate to Depositions.

I, Thomas F. Daniels, Notary Public, in and for the county and state of New York, duly commissioned, sworn and qualified, hereby certify.

That pursuant to the stipulation hereto annexed, the foregoing depositions on the part of the complainant were taken before me at the city of New York, at my office, No. 29 Wall
223] Street, at the time designated on said depositions, as will more fully appear thereby.

That upon the taking of said depositions neither of the parties was represented before me.

That the said witnesses, before making their depositions, were each by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their respective depositions were then typewritten in the presence of said witnesses, and said depositions were then read over to said witnesses respectively, and subscribed by them in my presence; that the names of said witnesses are Henry S. Wood and George W. Catt.

I do further certify that I am not of counsel or attorney to any of the parties hereto, and am not interested in the event of the cause.

That I have retained the said deposition in my possession until delivered by me at the postoffice of the city of New York to a proper clerk in charge for mailing.

That said depositions, together with this my certificate, were enclosed in an envelope or wrapper in letter form, which was securely sealed and directed to J. A. Sladen, Esq., clerk of the Circuit Court of the United States for the District of Oregon, Portland, Oregon, and in this form and condition I deposited and delivered the same at said postoffice of the city of New York, prepaying the postage thereon.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at said city of New York, this twenty-fourth day of February, one thousand eight hundred and ninety-six.

(Seal)

THOS. F. DANIELS,

Notary Public, N. Y.

(Endorsed): Filed March 2, 1896. J. A. Sladen, Clerk.

[24] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	}

Testimony.

United States of America,	}	ss.
District of Oregon.		

This certifies that on this 7th day of January, 1896, at the hour of 2 P. M., the parties herein appeared before the undersigned, Geo. A. Brodie, examiner of the above-entitled Court, the complainant appearing by Mr. L. B. Cox, of counsel, and the defendant appearing by Mr. Rufus Mallory, of counsel, and thereupon the taking of testimony on the part of the complainant was begun as follows:

Counsel for complainant offered in evidence the contract, or what purports to be a contract, of copartnership between Lee Hoffman and John McMullen, formal proof of which is waived by the defendant. The same is received in evidence, filed and [225] marked "Complainant's Exhibit No. 1, G. A. B. Ex."

FRANK T. DODGE is thereupon called as a witness for the complainant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX.

Q. What is your occupation?

A. Clerk of the water committee of the city of Portland.

Q. How long have you held that position?

A. Six years, I think; I won't be sure.

Q. You have been subpoenaed to appear and bring certain records appertaining to the controversy in which your testimony is now being taken. I will ask you to state if you have in your possession as clerk of the water committee a certain contract which was entered into between Lee Hoffman and the city of Portland, acting through its water committee. A. I have.

Q. Said agreement bearing date the 10th day of March, 1893?

A. Yes. (Witness produces the paper referred to).

[226] (Council for complainant offers in evidence the document presented by the witness, dated the 10th day of March, 1893, signed to Hoffman & Bates, by Lee Hoffman and Henry Fail- ing, chairman of the water committee, together with the specifications, etc., attached thereto, and the endorsement in writing at the end of the specifications bearing date March 10th, 1893, and signed Isaac W. Smith, engineer of the water committee, it is agreed between counsel for complainant and defendant that a copy of this contract may be prepared and when certified by the examiner may be received in evidence in lieu of the original and marked "Complainant's Exhibit No. 2.")

Q. I will ask you whether or not any amendment or alteration, whether by addition or subtraction or otherwise, was made by the water committee or its chief engineer, or any one else acting in its behalf, to the terms or specifications in the contract (which has just been offered in evidence, and if so, whether or not there is any written memorandum of the same in your office?

A. I am not able to answer that question positively. I have not thought of the matter at all, and did not have time to prepare myself since I got this subpoena. In speaking with the engineer, I showed him the subpoena, and made mention of the fact of the alterations. He said at first there had been none. I said, "Was not there some change made in taking off some plate at Sandy River Crossing?"

Q. You need not go into details about that.

A. Then I cannot answer the question.

Q. Is there any one connected with the water committee who would have better knowledge of such matters than yourself.

A. I think the chief engineer would.

Q. Who is the engineer? A. Isaac W. Smith.

Q. Now, I will ask you to state if you know what was done under the contract which has just been offered in evidence as Exhibit No. 2. towards the performance of the work therein provided to be done.

[227] A. The terms of the contract were generally complied with, if I understand your question correctly.

Q. I wish you would make a general statement now, and by that I mean a comprehensive statement, which will also be particular as to the amount of the work that was done under this contract and the general condition of affairs as between the water committee and the other contracting party at this time.

A. Allow me to state I did not understand your question, Mr. Cox, or I should not have answered as I did. In this subpoena it wished me to state the amount that was paid according to the contract, and then the amount that was paid for extra work. When you spoke of work that was done under the contract I had in view this final estimate which I brought down showing the total amount which was paid under the contract less the retained percentage of ten per cent that has never been paid. It is held until the pipe line is finally accepted by the water committee. There has been no formal acceptance of it. I stated generally that the work was done, simply because the large bulk of the work according to the final estimate has been paid for. I wish to explain that I do not feel competent to say whether the work has been done or not. I am custodian of the papers, but the engineer is the man to say whether the work has been done or not.

Mr. COX.—You are some little in advance of my question.

(It is stipulated between counsel herein that all the work provided for in the contract Exhibit No. 2 has been performed in accordance with the terms of the contract, and that consequently it is unnecessary for the complainant to introduce evidence on that point.)

Q. I wish you to state if you have any records in your office showing what, if any, extra work was done for the purpose of bringing Bull Run water to Portland, that is, any work having that object in view in addition to the work covered by the contract, Exhibit No. 2.

A. That would take quite a while to prepare an exact answer to. Perhaps I ought to explain why. In the beginning the water committee decided that I should open an account with each different head under which the work was subdivided by the engineer and keep the account in that way, and not with the numerous contractors. There was nothing to the credit of any contractor until the engineer at the end of the

month made his estimate; then there was a cash payment, and that amount was charged under the proper head. I have got my books of account with Hoffman and Bates for this work, or the principal portion of it, made up in an account known as "Manufacturing & Laying of Steel Conduit."

Q. Could you determine from an inspection of the books kept by you as clerk of the water committee the extra work which was done by Hoffman in addition to that covered by the contract, "Complainant's Exhibit No. 2," for the purpose of bringing Bull Run water to Portland, and its value?

A. Yes, sir.

Q. I will ask you to make that investigation and prepare yourself to give such testimony at a later stage. About how long will it take you?

[229] A. Just at present I am extremely busy with the closing up of the year's work. I can give it to you in three days, or sooner, if you require it.

Q. I understand that you are not in position at this time to give any evidence as to the value of the extra work as well as to its character?

A. No. As to its character, I could not tell you that.

Q. Now, I will ask you if there are any records in your office which will establish the amount of money which has been paid on the contract, "Complainant's Exhibit No. 2," to Lee Hoffman or for his account?

A. Yes. There is the final estimate showing the total amount of work was \$509,825.22, of which amount 10 per cent is retained, which is \$50,982.52. There has been paid on the engineer's estimate \$458,842.70.

Q. Then I understand 90 per cent of the principal sum has been paid over by the water committee to Lee Hoffman?

A. Yes, sir.

Q. At what time was the last payment made?

A. The 20th of December, 1894. This is the receipt of Hoffman & Bates for the last payment. (Witness produces receipt.)

(Counsel for complainant offers in evidence the paper produced by the witness and described by him as the final estimate of the work upon the construction of which this payment, or the payment of 90 per cent of the contract price, was consummated and the balance paid over. It is stipulated between

counsel that a copy thereof may be made and substituted in lieu of the original, and marked "Complainant's Exhibit No. 3.")

0] Q. In connection with the final estimate proper which you have produced there appears to be a number of specifications of particulars. I wish you would explain what they are.

A. Well, this is the amount under each different size of pipe, 35-inch pipe and No. 6 plate.

Q. Without going into details is that a specification of the items that go to make up the aggregate found on the estimate?

A. Yes, this is simply a recapitulation. You see it there. (Pointing to document.) Those figures there are identical with these.

Q. These are taken from the preceding two pages?

A. Yes.

(Counsel for complainant offers in evidence the papers referred to by the witness. It is stipulated between counsel that a copy thereof may be substituted in lieu of the original, and marked "Exhibit 3A.")

Q. I notice that these estimates and the vouchers filed therewith, as well as the original contract, are in the name of Hoffman & Bates. You understand, do you, that Mr. Lee Hoffman was doing business under that name? A. Yes, sir.

(Witness excused for the present.)

JOHN McMULLEN, the complainant, is called as a witness in his own behalf, and being first duly sworn testified as follows:

231]

Direct Examination.

Questions by Mr. L. B. COX:

Q. State your place of residence.

A. San Francisco, California.

Q. You are the plaintiff in this suit? A. I am.

Q. Exhibit No. 1 offered in evidence purports to be a contract of copartnership between Lee Hoffman and yourself touching certain matters therein specified and it has been admitted by counsel for both sides that the work therein referred to has been executed; I wish you would proceed and state what, if anything, you had to do with the execution of the work by way of contribution of money or services or otherwise.

Counsel for defendant objects to the question so far as it refers to anything that may have been done after the 14th day of September, 1893, for the reason that what may have been done after that is immaterial and incompetent.

A. Well, I carried out everything that that contract implies; we frequently conferred together as to the best way to administer the work, to inaugurate, to start it, and to conduct it, and we conferred together relative to the best men that either one of us might have available.

Q. When you say "we," explain who you mean.

A. I mean Lee Hoffman and John McMullen, and we jointly conferred together and determined matters and things in connection with this business that was to be inaugurated and to be prosecuted, and we did that personally, and we did it by letters and telegrams.

[232] Q. Where were you at the time Exhibit No. 1 was signed?

A. I was in Portland, Oregon.

Q. How long were you here after the execution of that exhibit.

A. I could not say exactly, several days, I think.

Q. Now, do I understand that it was during that time you and Mr. Hoffman were conferring upon the subject of the execution of the work? A. Yes, sir.

Q. State what, if anything, you contributed in the way of money or property towards the execution of that contract between you.

A. Well, we canvassed the subject of a plant, and what was available, and what he had and what we had—I mean now the San Francisco Bridge Company; we had a plant at Seattle; it was determined that so much of the plant that was suitable would be shipped over to start this work with; this plant was so shipped and was put on the work, and was used during the construction of the work; I think the value of that plant was about fifteen hundred dollars; there was also some other plant that was purchased by us in San Francisco and shipped up here, one item of which I call to mind now was a portable forge for heating rivets in the field. There was also some plant that was purchased in New York, at least it was purchased by the San Francisco Bridge Company representa-

tive in New York; I think it was purchased in Pittsburg; some shears for shearing iron, and some hydraulic riveters.

Q. Do you remember what it cost?

A. No; I said riveters—I think it was an hydraulic punch, 33] and I think the cost was in the neighborhood of twenty-five or twenty-seven hundred dollars.

Q. Do you mean for the punch?

A. No, I mean for the whole; the punch, I think, was three or four hundred dollars for the punch and shears.

Q. Then the whole amount that you contributed all told to the prosecution of the enterprise was how much?

A. In money or plant I think about twenty-six or twenty-seven hundred dollars; somewhere between twenty-five hundred and three thousand dollars.

Q. You mentioned the San Francisco Bridge Company; state what your relations to that institution are or were.

A. I was president and general manager, and principal stockholder.

Q. What connection had you with furnishings which were provided by that company to this work?

A. They were furnished and provided at my request by this company—by the San Francisco Bridge Company.

Q. In exhibit No. 2 it is one of the requirements that the contracting party, Mr. Hoffman, should give a bond with sureties to the water committee for the execution of that contract. I will ask you to state what, if anything, you may have had to do with that.

A. Well, after the award was made, we canvassed the subject, and Mr. Hoffman stated that there were plenty of people—merchants or firms in Portland—who would be glad to go on his bond for this contract, because they wanted his trade 234] that would be required—wanted to sell him the goods that would be required in the execution of the contract, and I went with him to the hardware men when he asked them to go on his bond—I think it was De Hart & Co. I particularly cautioned him; in fact, I remonstrated with him about it.

Q. You need not go into details; I simply asked what you did in regard to this matter of a bond.

(Counsel for defendant objects to the question as incompetent and immaterial.)

A. Well, the bond was given, but the only active thing I did was to try to influence Mr. Hoffman as far as possible not to get people on his bond who expected his trade.

(Answer objected to by defendant's counsel.)

Q. I will ask you to state whether or not Mr. Hoffman made any demand or request upon you to provide or assist in providing any sureties on that bond.

A. He never did; on the contrary, he told me there was any number of people in Portland would be glad to go on his bond.

Q. I will ask you to state what the arrangement was between Mr. Hoffman and yourself in regard to the active supervision and prosecution of the work contemplated by your contract, Exhibit No. 1?

[235] A. Well, it was agreed and understood between us that the business to be done in Portland or in Oregon would be attended to by Mr. Hoffman, because he resided here, and knew the water committee, and the engineer, and was familiar with everything here, and it was also agreed that inasmuch as we had an office in New York, we had an office in San Francisco, and an office in Seattle; it was agreed that any outside business that was to be transacted in the interests of the partnership at these places would be attended to by the San Francisco Bridge Company at my direction.

Q. I will ask you to state what, if anything, was done by way of complying with any requests that were made by the San Francisco Bridge Company at your request towards the prosecution of this work.

A. Well, we did a great many things in San Francisco in the way of purchases, and in the way of investigating the most economical method of construction or doing the work; there was no one in Portland that had had any experience; Mr. Hoffman never had had any experience in pipe work, while in San Francisco there was a great many people, or perhaps not a great many, but several, in particular the Risdon Iron & Locomotive Works, who had been engaged in business, and at Mr. Hoffman's request, repeatedly by telegram, sometimes by letter, I conferred with these people.

MR. MALLORY—The letters are the best evidence on that subject.

MR. COX—It is as to the proof of the contents of the letter, but I want to show the fact that he did perform certain services.

Q. How long did this action on your part, or the part of the San Francisco Bridge Company at your instance, continue?

[36] A. It continued throughout the whole job; Mr. Hoffman, after a certain period in the progress of the work, refused to or at least, he desisted from making any demand on us for anything in connection with the job, but I was repeatedly in Portland afterwards, and repeatedly on the work, and the man whom we had up here as general superintendent, Mr. Hugh Foy, was the man that was employed by the San Francisco Bridge Company for a number of years, and was a stockholder, and had a direct interest in the San Francisco Bridge Company; consequently, remained as superintendent on the work during all the work that was done during 1893. There was perhaps a dozen or fifteen men, sub-superintendents or skilled men, that had been furnished or put on the work by the San Francisco Bridge Company, men who were accustomed to do that kind of work for which they were selected.

Q. State what your willingness was to comply with any request that might have been made upon you during the time of the prosecution of this work, and assisting in its execution.

A. We were always willing to do anything that we had agreed to do.

Q. You may state whether or not any sums of money have been paid you on account of the moneys earned in the execution of this work by the city of Portland.

A. We were never paid anything; we were never reimbursed for any of our original capital invested in it.

Q. What knowledge have you—personal knowledge—in regard to the aggregate amount of work which was performed both under the original contract with the city of Portland, and any additions thereto, which had for its object bringing the Bull Run water to the city of Portland?

[237] A. I had a general knowledge of the value of the work done, and I knew it was substantially as has been shown by the estimate of the engineer.

Q. Well, have you any particular knowledge in regard to this matter?

A. No, I have no detailed knowledge.

Q. You may state what knowledge you may have, or may have had, prior to the institution of the suit in regard to the moneys that may have been paid by the city of Portland or the water committee on account of the particular work or any extra work mentioned in the contract referred to.

(Objected to by defendant's counsel as immaterial.)

A. Yes, I had a general knowledge that the work was paid for substantially as was required, but I had no specific or detailed knowledge of the amounts paid at the different times, or of the disbursements made at different times by Mr. Hoffman.

Q. I will ask you to state whether, at any time, you made demands upon Mr. Hoffman for information in regard to these particulars.

A. Yes, I made demands upon him.

Q. What time was it?

A. About the 4th of December, 1894.

Q. What was the result?

A. He refused to accede to my request, and declined to permit me or my representative to inspect the books and accounts of the job.

Q. What reason did he assign for, if any?

A. I don't think he assigned any reason.

[238] Q. You may state whether or not anything was said or discussed between you as to the fact of your interest in the work or its proceeds as an owner.

A. He never denied my interest in the work.

Q. My question is whether or not there was any discussion between you on that point.

A. Yes, there was; I don't know that there was any discussion on that point—when I asked him to show me the books and when I desired to get a general idea of the books—of the condition of the job; he always met me with the proposition to know what I would take for my interest in it, and I always declined to make any offer, to accept any sum, unless the books were disclosed, and that was about the sum total of what transpired at the meeting on the 4th of December, 1894.

Q. Upon what ground, if you assigned any, did you make your demand for an inspection of the books?

A. On the ground that I was a partner on the job, and had as much right to see the books as he had.

Q. And what was his response?

A. Well, his response was—he got ill-tempered, and his response was that I could not see the books.

Q. Now, you may state whether or not you ever made a request upon him for a statement or information as to the amount of money which had been earned in the execution of this contract apart from an inspection of the books.

A. Well, I made a demand on him for a statement of disbursements on account of the job, and the moneys earned; I had a public knowledge, that is, they were public in the papers that could be seen at the water committee's office, of the amount of the estimates every month.

239] Q. What was his response to that?

A. Well, he declined absolutely to give any data whatever relative to the job, and always coupled it with the proposition that I should name a price for which I would sell out.

Q. You have said that you contributed certain properties towards the execution of this work; state if you know whether or not Hoffman contributed anything in the way of property thereto.

A. Well, I think he contributed a certain amount of plant that he had on hand, that was the understanding when we started the job; I did not see that plant, yet I am satisfied that it went on to the work.

Q. Have you any personal knowledge at the present time as to the existence or condition or value of the property contributed by yourself or the San Francisco Bridge Company at your request, and by Mr. Hoffman, towards the execution of this work?

A. I have not.

Cross-Examination.

Questions by Mr. R. MALLORY.

Q. You are aware that Mr. Hoffman is dead?

A. Yes, sir.

Q. You say in the matter of performing your part of the contract, Exhibit No. 1, you did all that that contract implies. Now, did you do all that it expresses?

A. I thin kso.

Q. You think that you did everything that it required you to do?

A. I think so.

[240] Q. You conferred together a very good deal in relation to this contract?

A. We did.

Q. Did you have any conferences together about this business prior to the time that the contract was awarded to Hoffman & Bates?

(Counsel for complainant objects to the question as incompetent and immaterial, and not proper cross-examination.)

A. Well, our conferences prior to the awarding of the contract were mainly relative to the cost of the work; I am now construing the awarding of the contract to be identical with the putting in of the bids which it was substantially within a day or two; prior to that time, we could not have conferred about this business, because we did not have any contract to confer about, but we had been estimating and figuring and calculating on the cost of doing the work as it was presented by the specifications.

Q. Whatever consultations you had with Mr. Hoffman relative to procuring the contract from the water committee was with a view of making you and he performing the work together in case you got the contract, was it not?

A. Yes, sir.

Q. You prepared the bids which were submitted to the water committee, did you not?

(Objected to by the complainant.)

A. Well, if by using the plural you mean bids for the different sections of the work as it was advertised by the committee, yes; if you mean only the part that was secured, manufacturing and laying the pipe, I should say no.

[241] Q. Whatever work you afterwards did in the way of manufacturing and laying the pipe was a result of your arrangement with Mr. Hoffman for procuring the contract in the first instance, was it not?

(Same objection.)

A. I think so.

Q. You and he made figures together for the purpose of bidding on this contract that was afterwards awarded to Hoffman & Bates, did not you?

(Same objection.)

A. We did.

Q. And the contract was awarded upon the bid prepared by yourself and Mr. Hoffman?

(Same objection.)

A. I think so; that is correct.

Q. Do you not know so?

(Same objection.)

A. Yes, I think I know so; if you will read the question again I will make it a little more explicit.

(Last two questions read to the witness by the Examiner.)

The WITNESS.—Yes, I know it is so.

Q. The bid that you prepared in company with Mr. Hoffman was with a view to the execution of the contract, Exhibit No. 1, in case the contract should be awarded upon your bid?

(Same objection.)

A. Exhibit No. 1 was not in existence at the time the bid was made.

Q. I will put my question in another form, When you and Mr. Hoffman were preparing your bid which was afterwards submitted for the work that was awarded to Hoffman & Bates, [242] did you not then expect to have the contract, Exhibit No. 1, executed for the purpose of carrying it into effect?

(For the sake of convenience, it is agreed between counsel that counsel for complainant may take a general objection to all questions submitted to the witness touching transactions which were had prior to the execution of the contract, Exhibit No. 1, relative to the work therein contemplated, which objection, unless otherwise specified, shall be based on the ground that the same is immaterial and not proper cross-examination.)

A. Carrying what into effect?

Q. For the purpose of performing the work described in your bid.

A. I don't quite understand that question.

Q. Then I will ask you another one; when you and Mr. Hoffman prepared the bid for manufacturing and laying the pipe mentioned in that bid, did you not then understand, and was it not agreed between you, that if you secured the contract for the work described in your bid, you would execute the contract, Exhibit No. 1? A. No, sir.

Q. When did it first occur to you to make contract, Exhibit No. 1?

A. After the water committee had awarded the contract to Hoffman & Bates on their bid; I think that award took place on the 4th or 5th of March; Exhibit No. 1 was made on the following day, or the 6th of March.

Q. Then while you and Mr. Hoffman were working together and preparing the bid, you had no expectation that if awarded [243] to Hoffman & Bates you would be a partner to the execution of the work?

A. Certainly I had expectations decidedly. All the correspondence for three months prior to that will show that it was mutually agreed that we should be partners.

Q. What, then, did you mean by your last answer, in which you said you did not expect contract, Exhibit No. 1, would be executed at the time you put in the bid for the work?

A. Well, your question seems to assume that Exhibit No. 1 was in existence before the bid for the work was put in.

Q. You misapprehended my question altogether; I made no such statement as that. Then I understand that while you and Mr. Hoffman were figuring together and preparing the bid for manufacturing and laying that pipe you expected to be partners in executing the work if you got it, if it was awarded on that bid?

A. Yes, that is correct, not only expected to be, but we had agreed to be.

Q. Then the contract, Exhibit No. 1, was simply reducing into the form of a writing the agreement that had already been made between you long previous?

A. That is not quite correct; the agreement was that we should bid together—that we should make a bid on this job together; now, there was an “if” there, in other words, the conditions that prevailed after the contract was awarded was different from the conditions that prevailed when we were simply in the air trying to see what the job would cost, and conferring with each other; but we had a tangible, absolute thing when [244] the award was made from the water committee of the city of Portland for a half million dollars’ contract, and that award was of record, and Exhibit No. 1 was a declaration that we were partners in the existing contract between Mr. Hoffman and the Portland water committee.

Q. Was the contract, Exhibit No. 1, reduced to writing at the time it was agreed upon between yourself and Mr. Hoffman?

A. It was reduced to writing on the day of the signing, on the 6th day of March, 1894.

Q. Had it been agreed upon at any time prior to that?

A. Well, I suppose by "it" you mean exact language—exact kind of instrument—I think not.

Q. Mr. McMullen, I do not mean that, and I think you fully understand that I did not; I want to know whether the substance, the general substance and purport of that agreement, had been understood between you and Mr. Hoffman prior to the time that that contract was awarded to Hoffman & Bates by the city water committee?

A. Well, I think I have certainly tried to make the matter clear.

Q. Let the examiner read the last question.

(Question read to the witness.)

A. The general substance and purport—is that the language of the question?

Q. Yes.

A. Had been agreed upon—the purposes had been agreed upon? Well, it was agreed before the award had been made that we were to be partners; now, after the award was made, this paper, Exhibit No. 1, is the identical agreement that we [245] mutually assented to—it was reduced to writing in Mr. Hoffman's attorney's office, and we both signed it.

Q. The general purport of that contract had not that been entered into between you long before that?

A. You understand as a lawyer that we could not make the contract—

Q. Just answer the question I have asked you.

A. No, you could not say that because this contract, Exhibit No. 1, says that so and so existed, and so and so did not exist before that award; we had agreed to be partners, if that is all the agreement meant after reducing it to writing, if the same thing was synonymous in your mind; I think the two things are entirely different.

Q. Let me put it in this form: When you and Mr. Hoffman were figuring upon a bid for manufacturing and laying the

pipe for the Bull Run waterworks, did you not have an agreement together to be partners in the performance of the contract if it was awarded to you?

A. We had a verbal agreement.

Q. That is what I am asking.

A. A tacit understanding, as our correspondence will show; I think the correspondence will show better than anything else.

Q. Well, I am asking the question—then it was with that idea in view that you and he bid together for that work, was it not?

A. We bid for it with the idea of getting the contract and doing it if we got it.

Q. You and he together? A. That is right.

Q. As partners? A. That is right.

[246] Q. After the work had been awarded, then you and he had your contract of partnership put in writing stating such were the facts as the new condition of things had brought into existence?

A. Well, that is correct; we couldn't have it before, judge.

Q. Well, Mr. McMullen, I am coming to the point; now, then, as I understand you, your statement is about this: You and Mr. Hoffman had an understanding together that you would bid for the work that has been named in your deposition, that in pursuance of that agreement you did prepare a bid for that work, and submit it to the water committee, and the contract was awarded by that committee to Hoffman & Bates, in whose name the bid was put in; that you and Mr. Hoffman afterwards made the contract, Exhibit No. 1, in this case, for the purpose of performing that work, is that it?

A. That is correct.

Q. Was any other bid submitted for that work by you except the bid agreed upon by yourself and Mr. Hoffman?

A. By that work, do you mean this particular section of the work?

Q. Yes.

A. And by me do you mean the San Francisco Bridge Company?

Q. Yes, yourself, or the San Francisco Bridge Company.

A. Yes, there was another bid put in.

Q. Did Mr. Hoffman know what that bid was before it was put in?

[247] A. Yes, Mr. Hoffman knew that it would be higher than the bid that we proposed to take the job on.

Q. Both you, then, and Mr. Hoffman knew that that bid was not in face to be a competing bid?

A. That is correct, sir.

Q. You submitted that bid to the water committee?

A. I think that is correct.

Q. The rules of bidding there required that you should deposit a certified check for I believe, 5 per cent—you will remember whether I am right—of the amount of your bid?

A. I think that is correct.

Q. Did you submit with that bid that certified check?

A. We did.

Q. Was this bid submitted in your name or in the name of the San Francisco Bridge Company.

A. Submitted in the name of the San Francisco Bridge Company.

Q. By yourself—you handed it to the committee?

A. No, I think—well, I won't be sure about that; the San Francisco Bridge Company had its Seattle representative here at the time, but it was done by my direction, if not by me personally.

Q. Mr. McMullen, you had not any expectation that that contract would be awarded to you on that bid when you knew that bid of Hoffman & Bates would be considered at the same time, had you?

A. I had not.

Q. Mr. McMullen, how long did you come to Portland before the bids were to be opened by the water committee for this work?

[248] A. I think about five to six days before; if you want it to be accurate, I will have to look it up.

Q. Did you prepare any bid for this work, or substantially the same work, to be submitted to that commission?

A. No, I did not.

Q. Did you do any preliminary figuring with reference to the bid upon that same work before you consulted with Mr. Hoffman? A. Oh, yes.

Q. Did you not, as a matter of fact, Mr. McMullen, come prepared, or prepared while you were here, a set of figures to be bid for substantially the same work, which was a number of dollars less than the amount of the bid agreed upon between yourself and Mr. Hoffman to be bid?

A. I never did.

Q. Did you ever have any such a bid as that that you exhibited to Mr. Hoffman?

A. Well, now, judge, I think you are falling into an error in confounding a bid with an estimate.

Mr. COX.—Don't be argumentative; simply answer the questions.

The WITNESS.—Repeat the question.

(The question is read to the witness.)

A. In the first part of the question it is a set of figures, in the second question it is a bid. Now, I cannot answer the question intelligently under the circumstances. There is a great deal of difference between a set of figures and a bid. If you mean a bid, then I will answer you; if you mean a set of figures, it is something different.

Q. I will ask you for a set of figures intended for a bid.

A. No, sir; never did; never had any set of figures that [249] were in any way intended for a bid except the set of figures that was put in by Mr. Hoffman, under the name of Hoffman & Bates, in which I had an interest.

Q. The set of figures or bid which I have referred to were they not exhibited to Mr. Hoffman, and did you not indicate or say to Mr. Hoffman that you intended to file them with the committee as a bid, and did he not object unless the amount was raised above the statement as he had prepared it?

A. I never did, and he never did; we conferred together about the amount that we should bid, and when we arrived at a conclusion the bid was put in, and that was the only time that our joint judgment agreed as to what the value of this work was.

Q. Do you swear, Mr. McMullen, that you did not come here with a set of figures intending to bid upon this work or if not did you not prepare a set of figures while here, intending to bid upon this work—which you exhibited to Mr. Hoffman, and that Mr. Hoffman objected to your making a bid without increasing the amount charged for this work?

A. I did not.

Q. You swear that you did not?

A. I swear that I did not.

Q. Now, then, I will ask you this question—

The WITNESS.—Now, let us be fair about this; you seem to take a great deal of interest in it.

[50] Mr. MALLORY.—Let me finish my question.

The WITNESS.—Now, I am free to admit, and I want it to go on record that it was my effort in toning down the joint bid that secured this work; if Mr. Hoffman had been left alone—

Mr. MALLORY.—That is not responsive to my question, Mr. McMullen, I will give you a chance to answer it.

Q. Did not Mr. Hoffman prepare some bids, or a bid that he intended to submit for this work—

The WITNESS.—No, no.

Q. (Continued.) That he intended to submit for this work before you came.

The WITNESS.—No, sir, I came here ten days ahead of time.

Q. (Continued.) I will say before you came here, or while you were here—

The WITNESS.—While we were here, our work was done jointly; when we differed upon any point, we argued it until we finally agreed.

Q. (Continued.) And did not you insist that the bid prepared by Mr. Hoffman must be reduced several thousand dollars before—

The WITNESS.—Well, Mr. Hoffman never prepared a bid; you are clear off the track. You keep talking about a bid when you mean an estimate; a bid is what you write and give to the water committee what you will do the job for, and an estimate is what you think the job is worth.

Q. (Continued.) Then I will use the technical terms, since you are so particular; that will make it necessary for me to ask another question. Did you not, then, when you came to this city, or while you were here, have estimates prepared for this work as a basis for a bid which proposed to do the work for a considerable sum less than the amount of the bid finally agreed upon by yourself and Mr. Hoffman?

A. No, sir, I did not. Let me tell you, judge, all the time, [251] up to the very evening before these bids were submitted, that

we were receiving telegrams and advices from San Francisco and from New York both on freights and the cost of iron and on the cost of plant to manufacture the iron, and I can show you a hundred and fifty telegrams at least, that cost \$500.00, that were received the last forty-eight hours while I was in Portland.

Q. You say that you had no such estimate that was raised at the instance of Mr. Hoffman?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did not Mr. Hoffman have an estimate prepared by himself as a basis for a bid for the work of which we are speaking, which you required to be reduced, assuring Mr. Hoffman that the work could not be done at those figures, and was not Mr. Hoffman's bid reduced at your suggestion?

A. No, his bid was not reduced; he never made but one bid.

Q. His estimate, then?

A. Well, the facts are these: That after I got to Portland, I think, judge, I can help you along in this, if you want it the way I understand it.

Q. Answer my question; if I don't get it right, you can correct me, but I want to get it just as it is.

A. The facts are these, that there was no definite, final estimate arrived at except the one that was put in the bid, but the other estimates were made jointly, and when I came to Portland, I brought all the data and information that I had gathered, and went into Mr. Hoffman's office, and laid them down on his table, and he at the same time, and in the same place, produced all the data and information that [252] he had gathered, and he had his engineer there, and Mr. Lockwood, an engineer of the San Francisco Bridge Co., and Mr. Hugh L. Cooper, another engineer in the employ of the San Francisco Bridge Co., were all together in the same room, and we had all these papers, and we took the different items in the cost up seriatim, and we argued them whether they were high or whether they were low, and every day we were getting telegrams all letters that caused us to modify sometimes to increase and sometimes to diminish our idea of the cost of each separate part of this work; generally, I would state, that I was low, that is, I insisted that if we were going to bid at all for

this work, we must put in a bold, hard bid; Mr. Hoffman was somewhat inclined to be conservative and the result of our joint judgment as to the lowest price that we should put in was agreed upon about 11 o'clock that night in Mr. Hoffman's office, in the presence of his engineer and our two engineers; on the next day it was written out by Mr. Hoffman's engineer on a blank form, and the bid put in by him. Now, that is substantially the way the bid was evolved.

Q. So, that the idea that we have is that you had come here with a lower bid which was afterwards raised?

A. You have got an erroneous idea that I came here to bid on the job independent of Hoffman; that is not true. On the contrary, it was absolutely agreed between us that we should bid together. Now, it was a question of our agreeing what bid we should put in.

Q. Yet it is true that you brought an estimate here that was lower than Mr. Hoffman's estimate?

53] A. I did not bring an estimate here.

Q. Well, you made one while you were here?

A. I don't think I made a whole estimate without his knowledge.

Q. And he made an estimate that was higher than yours, and he insisted upon yours being raised, and you insisted on his being reduced; is not that true?

A. No, that is not true.

Q. Well, let it stand that way; you afterwards agreed on an estimate?

A. Yes, we afterwards agreed on an estimate for a bid.

Q. And you did bid? A. Yes.

Q. And you afterwards put in another bid that was higher than the bid that you and he had agreed upon?

A. Yes, the San Francisco Bridge Company put in a bid.

Q. What made you put in that bid?

A. Well, I put in that bid because it was known that the San Francisco Bridge Company had got data, and had been figuring on this work; we did not care anything about it.

Q. You did not tell Mr. Failing or Mr. Dodd that that was a mere flyer?

A. I think that Mr. Failing and Mr. Dodd and their engineers before that contract was awarded knew that the San

Francisco Bridge Company and Mr. Hoffman were partners in this job; there was no secret about it.

Q. Did you tell them?

A. I did not tell them then; I told them afterwards.

Q. Told them it was a mere flyer?

[254] A. No, sir; I didn't tell them it was a mere flyer.

Q. You say there was furnished from Seattle some plant which you say was of the value of \$1500.00?

A. Or thereabouts.

Q. Plant belonging to the San Francisco Bridge Company—that they owned? A. Yes, sir.

Q. It was turned over to Mr. Hoffman after you and he had consulted about it, and the price of it was to be what Mr. Hoffman thought it was worth; is not that the fact?

A. Well, it was ordered shipped here.

Q. Did you not give him an estimate of what it was—

A. No, I don't think I gave him an estimate; I think Mr. Lockwood, when he returned to Seattle—well, really, if you want to know the whole thing—

Q. Just answer the question.

A. Well, it was Mr. Foy; after Mr. Hoffman and myself had agreed that Mr. Foy, who had been in our employ, should become superintendent on this work, Mr. Foy went to Seattle, and looked at the San Francisco Bridge Company's plant.

Q. You need not go into all that detail; you can simply state whether the plant came here, and what it was worth.

A. You asked me if I didn't say that Hoffman could have it at his own price and I was selling it to Hoffman.

Q. I just asked you whether you did say so. I will call your attention to some matters that may remind you of it before I get through.

A. I won't dispute that; I am telling you how the plant came here or was sent here.

Q. What is the value of the heater—the rivet heater that was sent up here from San Francisco?

[255] A. What was the value of that? I don't know; I think there was ten or twelve of them; I think eighteen or twenty dollars apiece.

Q. Perhaps \$100 for the lot?

A. Yes, may have been \$25.00 apiece; may have been \$200.00 for the lot.

Q. That was charged up here to Hoffman & Bates?

A. Yes.

Q. Was that ever paid for? A. Yes, I think so.

Q. It was paid for by Mr. Hoffman out of the business here? A. Yes, I think so.

Q. Was the plant that you got from Seattle ever paid for?

A. I don't think so.

Q. Is it not a fact that he sent down money, and the San Francisco Bridge Company refused to accept it?

A. Well, he might; he might have tendered the money after he got ready to "fire me" on the contract; he probably did?

Q. Don't you know he did send down his check for the money, and you people refused to accept it?

A. No, at the time he did, the San Francisco Bridge Company was in the hands of a receiver, and whatever the receiver may have done I do not know.

Q. You say the money, plant, and all amounted to twenty-six or twenty-seven hundred dollars?

A. Possibly.

Q. There was a pair of shears—there was a punch and a pair of shears purchased in the east—in Pittsburg—were not they paid for; didn't Hoffman pay for them?

A. I think not.

Q. Has not the money been paid back to you for them?

56] A. I think not; that is my impression. I think the forges that came from San Francisco were paid for out of the firm money, but I do not think the punch and shears were paid for; I may be mistaken about that.

Q. Did they tender payments for them?

A. No, I don't think so; not to my knowledge.

Q. Now, Mr. McMullen, you say that Mr. Hoffman, at the time he got his bond here on this contract, told you that he did not want you to help furnish any of that bond?

A. Yes, I said so; that is right.

Q. You swear—

A. I offered to go on the bond personally, and Mr. Hoffman said that they would insist on having Oregon men.

Q. And he did not ask you to assist him in furnishing a bond? A. No, sir, he did not; on the contrary—

Q. Do you know the amount of the bond?

A. I think the amount of the bond was something like two hundred thousand dollars.

Q. Mr. Hoffman told you that you need not go on the bond?

A. I went with Mr. Hoffman when he asked the parties to go on the bond.

Q. He told you that he did not want you to assist him in getting this bond, yet he was giving you half of the contract, but he told you that he would furnish this bond without any trouble to you; now you swear to that?

[257] A. I swear that Mr. Hoffman never asked me to furnish any portion of the bond; on the contrary, there was just as many people wanted to go on the bond as you could shake a stick at; that is, figuratively speaking. I asked Mr. Hoffman not to allow a merchant to go on that bond, because a merchant would expect about ten per cent more for his goods than his goods were worth; Mr. Hoffman told me that he had had some parties on his bond before, and he did not think they would overcharge him.

Mr. MALLORY.—Well, you answer a good many more questions than I ask you.

The WITNESS.—Well, you make your questions in such a way that it requires a good deal to answer them.

Mr. MALLORY.—I will give you an opportunity to answer them and not talk so much.

The WITNESS.—I recognize it is a lawyer's privilege to do the talking.

Mr. MALLORY.—I want you to answer my questions; I think you certainly have mistaken your calling if you think it is the business of a lawyer to do the talking.

Q. Now, Mr. McMullen, you say that there were a large number of persons anxious to go on that bond?

A. Well, anxious might be stretching it a little—I will say willing; I won't say a large number, I will say several.

Q. Several persons willing to go on that bond?

A. Yes, sir.

Q. How did you ascertain that?

A. Well, Mr. Hoffman told me so.

Q. Now, with all these people so willing to go on the bond,

your functions in the matter were simply to advise Mr. Hoffman not to take men on that bond that he would be tied up to; is that it?

A. Well, we talked that over; that was my suggestion because—

258] Q. That was really all you had to do in the matter of getting the bond?

A. No, I went with Mr. Hoffman when he asked Mr. De Hart.

Q. Did they know your business?

A. I don't know whether they knew that at all; I think he advised the people I had an interest in it.

Q. Your presence, do you think, was an object that would tend to get signers for the bond?

A. I don't know that, Judge; I have not said so.

Q. How many of the men who signed the bond when you were with him knew that you were a partner?

A. I don't know of any of them signing when I was with him; but he asked some of them to sign when I was with him; the bond was not prepared at that time.

Q. Did any of them ask if you were to be a partner?

A. That was not discussed when they were asked to sign the bond.

Q. In procuring the bond, was that not your part to go around with Mr. Hoffman to see the people?

A. You try to make it appear a very difficult thing to get that bond.

Q. I am asking you a question which I would like to have you answer.

A. Well, that is not the question; you say my part was to go around with him; I say I offered myself to go on the bond, but Mr. Hoffman told me there was plenty of people that he did business with that would gladly go on the bond.

259] Q. Mr. McMullen, had you not reason to believe that, since you are not a resident of this city, and not known to have any property in it, that Mr. Hoffman thought your name would be of any particular advantage on that bond; did you think that?

A. I did not think any thing about that.

Q. So, that when you offered yourself to go on the bond that you did not consider that you were doing more than making a sort of joke of it?

A. I think the bond provided that the signer should qualify in a certain sum of money before a notary public.

Q. You say it was understood that Mr. Hoffman was to do the business here in Oregon—whatever there was here he would do it?

A. We arrived at that conclusion when we determined to put in a bid in his name.

Q. But if there was anything to be done outside, you were to do that in San Francisco, New York, or Seattle?

A. Yes, sir.

Q. That was a part of your agreement that you were to do that? A. That is right.

Q. That is what you said?

A. Yes; you understand, Judge, when this bid was put in—

Mr. MALLORY.—I don't care to go over that again; you have answered my question.

Q. Now, there was considerable conversation between yourself, Risdon, Wolff & Zwicker, and others, about the manner of doing this work after the contract was entered into?

A. I don't think there was any between Wolff & Zwicker no, sir, Wolff & Zwicker made an offer to build the pipe at so much.

Q. You did not have any discussion with Wolff & Zwicker, or Wolff, or any of their firm about what was the necessary plant for you people to have, or how you were to do the work; you did not consult with them?

A. No, I don't think we ever consulted with them.

Q. When you say "we" I will ask you who you mean?

A. When I say "we" I mean Mr. Hoffman and myself.

Q. I will ask you to state if the work that you did on your part in carrying out this work did not consist in consulting Wolff & Zwicker, and Risdon and others about the best way to arrange your plant, and have the business carried on—excavating the ground, and laying the pipe, and so forth.

A. I did considerable of that character of work.

Q. Was that not chiefly what you did? A. No.

Q. What was your chief employment?

A. Well, I think the principal thing that we did, or one of

the principal things which every contractor will recognize as the principal thing, was to get this job.

Q. I am talking about what you did after the contract was signed, Mr. McMullen.

A. Oh, well, we conferred, as one partner would with another, and I did everything that I could do; I furnished, in the first place, a superintendent for the work, and I furnished three or five, or seven perhaps, subsuperintendents from our equipment; I have got plenty of Mr. Hoffman's letters, asking me if I could get such and such a man that could fill that position.

[161] Q. Did you not recommend to Mr. Hoffman Mr. Foy as a proper person to be superintendent? A. I did.

Q. Did you not leave the matter of hiring him entirely to Mr. Hoffman? A. I did.

Q. Now, when you, in your examination-in-chief, say that you furnished these men and a number of foreman whom you mentioned, did you do anything more than simply recommend these people as suitable persons for the place desired of them?

A. I did more; I caused the San Francisco Bridge Company to let these persons go from its employment and go to work for Hoffman & Bates on this pipe line.

Q. Were they not paid as other employees for this work were paid? A. Certainly, I presume so.

Q. Then the San Francisco Bridge Company did not furnish these men at your expense, but they were put on the pay-roll and paid here? A. Judge—

Q. Just answer my question.

A. Certainly, they were paid here, and were on the pay-roll here; it is absurd; let me ask you, Judge—

Mr. MALLORY.—I want you to answer my question.

Q. You say, Mr. McMullen, that you performed everything that was required of you by the terms of this contract, "Complainant's Exhibit No. 1"; it is provided here that each should receive one-half of the profits, or bear one-half of the losses which should result therefrom; I would like to ask you whether or not if you understood when this contract was prepared that you were to furnish part of the money necessary to carry on the business?

(Counsel for complainant objects to the question as incompetent.)

A. I expected to furnish part of the money.

[262] Q. I will now ask you to state if you did furnish your portion of the money as it was required to carry on this business?

(Counsel for complainant objects to the question as immaterial.)

A. I furnished and paid several bills on account of that job.

Q. That is not my question; please answer my question.

A. Well, the words, "your proportion of the money," is a relative term.

Q. You may state whether you did or not.

(Same objection.)

A. If by "proportion of the money" you mean if, whenever Mr. Hoffman said he wanted ten thousand dollars of me that I forthwith sent it to him—no, I did not; if by "proportion of the money" you mean money actually required in the conduct of the business, I should say yes.

Q. Do you not know, as a matter of fact, that Mr. Hoffman advanced out of his own money, and was required to advance out of his own money, at least fifteen thousand dollars to carry on that business?

(Same objection.)

A. I know that before this job—

Q. Just answer my question.

A. I don't know it.

Q. Were you ever informed so by Mr. Hoffman?

A. I may have been but I did not believe it.

Q. Don't you know that he told you so repeatedly?

A. No, I don't know that he told me so repeatedly.

Q. Don't you know that he advised you so by letter?

A. No, I don't think he did.

[263] Q. Will you swear that he did not?

A. I will not swear; the letters are the best evidence of those matters.

Q. Now, then, did not Mr. Hoffman, while he was carrying on that business, notify you that ten thousand dollars would

be necessary for you to put up to meet the bills and debts due on account of the business?

(Counsel for complainant objects to the question, and all others of similar import, on the ground that the same are immaterial.)

A. Mr. Hoffman when he first—

Q. Just answer my question.

A. I am going to answer it—well, he notified me of that at a time when by his own letters I knew there was not a dollar required.

Q. I am asking you what the facts were.

A. He notified me that.

Q. You did not send the money, or did not give the money to him as he requested, did you, Mr. McMullen?

A. I sent money to him on account of this job, and paid bills and notified him that I paid them.

Q. Mr. McMullen, when you were notified by Mr. Hoffman that the contract of this business was such as to require ten thousand dollars from you without delay, did you, or did you not, furnish the money?

A. I did not furnish the money, because I knew he was misrepresenting the facts to me.

Q. I did not ask the reason why; but you did not furnish the money?

A. That is the reason I did not furnish it.

264] Thereupon the further examination of this witness is adjourned until January 10th, 1896, at 2 o'clock P. M.

[Signed]

GEO. A. BRODIE,

Examiner.

Office of Geo. A. Brodie, U. S. Examiner, Portland, Oregon, January 10th, 1896, 2 P. M. At this time appears the complainant herein by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings were had, to-wit:

Mr. JOHN McMULLEN resumes the stand for further cross-examination.

Questions by Mr. MALLORY:

Q. You did not, as a matter of fact, furnish any money for

carrying on this contract by paying it into any treasurer or to Mr. Hoffman for that purpose?

(Objected to by complainant's counsel as immaterial.)

A. I paid bills.

Q. That does not answer my question. I asked you if you paid it to Mr. Hoffman.

A. Yes, I furnished money, but did not pay any money to Mr. Hoffman or into any treasurer because the company never had any treasurer. I furnished it to pay bills with on account of this job.

[265] Q. There was a plant owned by the San Francisco Bridge Co. that was turned over to Mr. Hoffman for the purpose of carrying on this contract, was there not? A. There was.

Q. There was an hydraulic punch and some shears purchased in the east—at Pittsburg, I believe—that was paid for by yourself or by the San Francisco Bridge Co., was there not?

A. There was.

Q. What other material or supplies did you furnish toward carrying on this work?

A. We furnished some portable forges for heating rivets that were purchased in San Francisco and shipped to Portland and used on this work. Besides the punch and shears referred to as having been purchased in the east there was some other items at the same time—some other things, tools, besides the punch and shears. I cannot tell exactly what they consisted of without looking up the inventory or bill for these tools.

Q. What was the entire value of the punch, shears, and tools?

(Same objection.)

A. I think between \$1,400.00 and \$1,700.00.

Q. What was the cost of the plant from Seattle—the value of the plant from Seattle?

A. Well, that is what I am giving you. You asked me for the value of the shears, punch, and tools.

Q. I mean the tools that you named; you said there were some tools connected with the shears and punch; I had reference to that.

A. I do not know. If that is what you mean I will have to change my answer.

Q. I do not refer to the Seattle plant; I refer to the punch, shears, and tools to which you refer.

A. I think the value of the punch and shears and other tools in that invoice was in the neighborhood of \$300.00.

[266] Q. Instead of \$1,700.00?

A. Yes, I think the value of the Seattle plant was in the neighborhood of \$1,300 or \$1,400.00.

Q. Then you did not pay any money to Mr. Hoffman or to any person for his use for the purpose of carrying on this business except that which you have mentioned?

A. Well, when you say for his use—

Q. I say for his use in connection with this business.

A. Well, for instance, we repaid the freight on the tools that were shipped over here from Seattle, I think, and we paid the expenses of getting those tools out; hauling them and shipping them. We paid one bill in New York to Mr. Clemens Hirshell of \$750 for his opinion and knowledge and experience in the doing of this kind of work and in the cost of this kind of work. I mean by this kind of work, steel conduit or pipe line.

Q. This was an expenditure, this \$750.00, made long before the contract was let by the city or the water committee?

A. Well, the employment of Mr. Hirshell might have been before, but some of the services were rendered after the awarding of this contract by the city of Portland. Mr. Hirshell had been superintendent and engineer on the Jersey City Water Works which was then nearing completion and which was some thirty-four miles of steel conduit substantially like the Bull Run Water Line, and Mr. Hirshell had full knowledge of the cost of that work and of the difficulties encountered in its construction, and was qualified to give us very valuable advice as to the mechanical construction of that pipe line.

[267] Q. Was his employment agreed upon between yourself and Mr. Hoffman?

A. Mr. Hoffman knew of it and approved of it and audited the bill of \$750.00, which we paid him.

Q. When you say "we," who do you mean?

A. I mean the San Francisco Bridge Company paid him and Mr. Hoffman approved the bill and audited it.

Q. Has it been paid by Mr. Hoffman out of the proceeds of this work?

A. It has not.

Q. Mr. Hoffman audited and approved this bill as a bill due to the San Francisco Bridge Company for money paid by them to Mr. Hirshell on account of advice and services he had furnished, is that it?

A. Well, I think he audited it when it was rendered, but he never said anything about paying it till he got ready to appropriate this contract to himself and to deny my rights in the premises. Then he considered it as a bill paid by the San Francisco Bridge Company. But certainly that was not the true status of this claim.

Q. My question was, Mr. McMullen, whether he audited that bill with a view of approving it and having the money paid out of the proceeds of this contract either to Mr. Hirshell or to the San Francisco Bridge Company.

A. Yes, he recognized and audited it as a just and proper bill to be paid.

Q. Out of the proceeds of this business? A. Yes.

Q. To the San Francisco Bridge Company or to Mr. Hirshell?

A. Well, we paid Mr. Hirshell, consequently it was in reality a contribution by the San Francisco Bridge Company towards the construction of this work—a moneyed contribution, [268] that is what it was. That is what we are talking about. Just as much as if Mr. Hoffman hired a superintendent and paid him some of Mr. Hoffman's own personal money.

Q. And when the bill was allowed by Mr. Hoffman the purpose was to have that amount acknowledged by Mr. Hoffman as property payable out of the proceeds of this contract either to Mr. Hirshell or to the San Francisco Bridge Company?

A. Well, I cannot answer that question; I do not know what was in Mr. Hoffman's mind.

Q. Why was the bill submitted to Mr. Hoffman for his approval and why was it allowed by him?

A. It never was submitted for his approval. When we spent any money on account of this job we notified Mr. Hoffman what we had spent and what it was for and sent him a copy of the bill.

Q. Why was this bill presented to him to be audited?

A. It was not presented to him to be audited. He never chose to audit it until nearly a year after it was presented or

more, when he made up his mind to get me out of this contract; then he proceeded to consider it as a bill, and directed it to be paid, but that was not the nature of it originally.

Q. What do you mean, then, by the answer you have already made that this bill was audited and allowed by Mr. Hoffman?

A. I mean that he recognized that we had contributed so much money towards the doing of this job that there was no dispute about it.

269] Q. Is it not a fact that Mr. Hoffman had been advised by you or by the San Francisco Bridge Company that Mr. Hirshell had been consulted with a view of procuring information upon which to base your bids, that his charge for that service was \$750.00, that the San Francisco Bridge Company had paid that bill, and that that company was entitled to receive from the proceeds of this contract the amount of money so advanced by them?

(Objected to by complainant as immaterial.)

A. It was not. Mr. Hirshell's advice did not relate only to the cost of this work; it related equally to the proper, best, and most economical manner of constructing the work. Now, I will answer the rest of the question; read it. [Question read to witness by the examiner.] Well, really, I do not know how to answer that question. I have stated that it was not for the purpose solely of ascertaining the cost of this work before bidding, but also for services and advice as to the best mode of handling the contract. Now, the status of the payment was as I have said—the San Francisco Bridge Company engaged him—

Mr. MALLORY.—That is not responsive to the question.

The WITNESS.—Well, the question is so long I cannot answer it.

Mr. MALLORY.—I can perhaps make the question shorter.

Q. Mr. Hirshell performed some services of various kinds in the way of furnishing information regarding the cost and execution of this work.

A. That is correct.

Q. For which he charged \$750.00, and that sum was paid by the San Francisco Bridge Company?

A. That is correct.

Q. Now, this bill was submitted afterwards to Mr. Hoffman with the expectation that it would be charged as a part [270] of the expenses of this contract and paid for to the San Francisco Bridge Company out of the proceeds of the contract, was it not?

A. Paid for as any other bill on account of this contract.

Q. Mr. McMullen, a considerable portion of the work you did in relation to this contract was done in trying to procure it, was it not?

A. If by trying to procure it you mean getting accurate information as to its costs and estimating what it was worth, my answer is in the affirmative—yes.

Q. The services you did before the contract was awarded was greater both in amount and importance than what you did after it was awarded and the written contract, Exhibit No. 1. was entered into, was it not?

A. Well, I am not prepared to put on so short a notice a correct value to what we did before the execution of the written contract and what we did after. There is no question but what we rendered valuable services before the making of the written contract, nor is there any doubt that we contributed very largely to the successful construction of the work. I would like to say right here, Judge, that—

Mr. MALLORY.—It would be better probably for you to confine what you have to say to answering my questions.

The WITNESS.—Let me answer a little further, then.

A. (Continued.) Let me say it was the services that we contributed before the signing of the agreement and contract which made it successful. In other words, if it had not been for the services that we rendered Mr. Hoffman would never [271] have had this contract to do. Mr. Hoffman has admitted that, and we can prove it beyond a doubt that he gave us the credit of securing this contract absolutely.

Q. You have had considerable correspondence in one way and another with Mr. Hoffman about this contract, have you not?

A. Yes, sir; I think about 275 or 300 letters and telegrams.

Q. I call witness' attention to a letter dated San Francisco, December 31, 1892, addressed to Lee Hoffman, and ask you if that is your signature. (Showing letter to witness.)

A. That is my signature, sir.

(Counsel for defendant offers in evidence the letter shown the witness. The same is objected to by complainant's counsel as immaterial and not proper cross-examination. The letter referred to is received and filed, marked "Defendant's Exhibit A." G. A. B., Examiner.)

(It is admitted between counsel for complainant and defendant, for the sake of convenience, that all other exhibits pertaining to matters which transpired before the execution of the agreement "Complainant's Exhibit No. 1," which may be offered in evidence by defendant, may be considered as objected to, on the ground, where no other specification is made, that the same are immaterial and not proper cross-examination.)

Q. I show witness another letter dated San Francisco, January 26th, 1893, addressed to Lee Hoffman, and ask if that is your signature.

A. That is my signature, sir.

(Counsel for defendant offers in evidence the letters last shown the witness and the same is received and filed, and marked "Defendant's Exhibit 'B'." G. A. B., Ex.)

Q. I show witness another letter, dated San Francisco, February 6, 1893, addressed to Mr. Lee Hoffman, and ask if that is your signature.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness and the same is received and filed, marked "Defendant's Exhibit C." G. A. B., Ex.)

Q. I now show witness another letter dated San Francisco, February 8th, 1893, addressed to Mr. Lee Hoffman and ask if that is your signature.

A. That is my signature to that letter.

(Counsel for defendant offers in evidence the letter last shown the witness and the same is received and filed, marked "Defendant's Exhibit D." G. A. B., Ex.)

Q. I show witness a letter, dated San Francisco, Feb. 13th, 1893, addressed to Mr. Lee Hoffman, and ask if that is your signature attached to that letter.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last

shown the witness and the same is received and filed, marked "Defendant's Exhibit E." G. A. B., Ex.)

Q. I show witness another letter, dated San Francisco, March 8th, 1893, addressed to Mr. Lee Hoffman, and ask if the signature attached to that letter is his signature.

A. That is my genuine signature.

(Counsel for defendant offers in evidence the letter last shown the witness and the same is received and filed, marked "Defendant's Exhibit F." G. A. B., Ex. Counsel for complainant objects to the evidence contained in this letter, as it [273] has no reference to this matter, that is, Exhibit 1 of complainant, or to the work which was to be done thereunder by the complainant and defendant, as being irrelevant and immaterial.)

Q. I show witness a letter, dated San Francisco, March 14th, 1893, addressed to Mr. Lee Hoffman, and ask if that is your signature?

A. The signature is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness. Counsel for complainant objects to so much of this letter as refers to matters other than the work being done by the complainant and defendant in the execution of the contract, Exhibit 1, as to so much of it as refers to any matter that took place between them prior to the execution of this contract, Exhibit 1, as being immaterial, irrelevant, and not proper cross-examination. The letter referred to is received and filed, marked "Defendant's Exhibit G." G. A. B., Ex.)

At this time, by consent of counsel, the examination of Mr. McMullen is suspended so as to allow the complainant to recall Mr. F. T. Dodge.

F. T. DODGE, is recalled as a witness for the complainant.

Direct Examination (Continued).

Questions by Mr. L. B. COX:

Q. I will ask you if you have made an examination as to the [274] entries in the books of the water committee touching extra work? A. I have.

Q. Apart from that covered by "Complainant's Exhibit No. 2," performed by Hoffman for the purpose of bringing Bull Run water to the city of Portland? A. Yes.

Q. Please state what you have found in the way of such entries.

A. I have prepared a statement of all the entries. This statement is headed, "Statement of all amounts paid to Hoffman & Bates by the water committee of the city of Portland, Oregon, from March 10th, 1893, when the contract for 'Mfg & Laying Steel Conduit' of the Bull Run Water Works was signed to January 7, 1896." The date of each payment, the number of each voucher, and the character of the work or material is given. (Witness produces statement referred to.)

Q. I will ask you to state from what you made up the statement of account which you have just produced.

A. From the vouchers, bills, and receipts of Hoffman & Bates, and from the entries in the books of the water committee.

Q. By whom were they prepared or kept?

A. The accounts were all kept by me.

Q. I understand that you have personal knowledge of the accuracy of the records from which you have taken this statement. A. I have.

(Counsel for complainant offers in evidence the statement which has been produced by the witness and identified by him in this matter, as showing the amounts which were actually [275] paid by the water committee of the city of Portland to Lee Hoffman on account of the contract, "Complainant's Exhibit No. 2," and also the amounts which were actually paid by the city of Portland to said Hoffman on account of extra work performed in connection with said contract for the purpose of bringing Bull Run Water to the city of Portland. Counsel for defendant reserves the right to make any objection to the competency of this testimony until to-morrow, but makes no objection on account of the nonproduction of the original evidence. The document referred to is received and filed in evidence, marked "Complainant's Exhibit No. 4," G. A. B., Ex.)

Q. I will ask you some questions in regard to that just at this juncture: You may describe the connection which the items you have described here as extra work bear to the items

designated as falling strictly under the contract, "Complainant's Exhibit No. 2"?

A. You wish to ask me what items, or shall I go on in a general way?

Q. Just in a general way.

A. There was an item, for instance, of "grubbing." The committee in advertising for bids for the work of excavating and laying of this pipe stated in the specifications that the right of way, 33 1-3 feet wide, had been cleared and grubbed. They supposed that had been thoroughly done, but there were places where they found that it had not been grubbed as it should be properly, and Hoffman & Bates were allowed extra money for doing that grubbing. It was also stated that roads had been completed. In some instances it was found that the roads were not wide enough for the teams of Hoffman & Bates [276] in hauling, and they widened the roads so as to make them passable for their teams. That was allowed as extra work. There was an item there for removing slides that was not in the contract; that was extra work. Then there was extra material; in filling in on the pipe it was found that the boxes in the man-holes, blow-offs, and other inlets should be placed in position as rapidly as the earth was refilled in the trench, and to save time, instead of making a separate contract with some other parties, as long as Hoffman & Bates had teams right along on the road, they were allowed payment for these boxes, so much for each box, furnishing the material and labor to make them up and put them in position. Those were not specified in the contract. There was also items for building flumes to carry off streams which would otherwise have flooded the trench during the severe rains that was not contemplated in the contract. There was also some items of supplies. The committee had men at work on their works, such for instance as the head works and the canal which Hoffman & Bates had nothing to do with. The committee bought in one instance a couple of tents and some picks and shovels from the commissary storeroom of Hoffman & Bates because it would save time and Hoffman & Bates carried on or kept a sort of store at the end of the line, and it would save several days by buying from them, instead of sending to town for them.

Q. I will ask you to state generally whether the items you have just been describing pertained to the matter of bringing

Bull Run water to the city of Portland, in connection with the contract, "Complainant's Exhibit No. 2"?

A. Entirely so.

[277] Q. I will ask you to state whether or not you have made any examination to determine whether there are other items in your books or which have been presented to the committee by Hoffman for compensation for extra work in line with that we have just been considering, which claims have been disallowed by the committee or are held in suspense?

A. I have no record other than reports of the engineer to the water committee of claims which he has recommended to be disallowed. I have no record of them other than his reports. Perhaps I might explain. The engineer would submit to the committee a claim, for instance, of Hoffman & Bates for \$1,000.00, and he would recommend that, say, \$500.00 of it be paid, and \$500.00 of it rejected. The committee would then pass upon it, and as they would decide they would order a voucher drawn either for the \$500.00 or \$750.00, or whatever they might decide upon. But almost without exception the committee was guided by the recommendation of the engineer. In fact, I do not recollect an instance where his recommendation was deviated from. The records of the engineer's office, his letter books and files would give that much more clearly than I could possibly do.

Q. These claims, then, were not filed with you as clerk of the water committee?

A. They were presented to the engineer, and the engineer in his report would usually submit these bills attached to his report. But I cannot say that all of them are in my possession. Some were referred back to the engineer and remain with him.

[278] Q. I will ask you to state what, if anything, you may know about a certain estimate which was paid in September, 1893, as to what notice was given to Hoffman or Hoffman & Bates, if any, as to the anticipation the water committee had prior to the maturity of that payment in regard to its ability to meet it.

A. I will read from the records of the water committee meeting held on August 15th, 1893, page 300, "Chairman Failing stated that the committee would have enough money to pay on August 20th, according to contract, for all work and

material furnished during July, but it was not certain in the present demoralized condition of the money market whether Harris & Company, who have a contract for the option, will take the bonds and furnish funds necessary to pay on September 20th for the work and material furnished during August, estimated at \$99,000.00. It was voted not to award any contracts for the above at present." (This "above" refers to pipes, for cast-iron pillars for Sandy River, etc.) "But to refer all proposals to the engineer to be tabulated." That is an extract. This is another extract—

Q. From the same meeting?

A. Another meeting on Sept. 7th, 1893. p. 301: "Chairman Failing stated that he had called the meetng in order that the committee might consider their financial condition and decide about letting more contracts." Then there is a matter which does not relate to this, then it proceeds: "After a general discussion of finances the committee voted not to let any contracts for reservoirs at present. The clerk was authorized to [279] return certified checks which accompanied proposals." Then I skip another paragraph that does not relate to this matter, then comes this paragraph: "Mr. Lee Hoffman, one of the principal contractors was invited into the room and informed fully as to the financial situation. After some discussion, on motion of Mr. Lewis, the committee adjourned." The business of the water committee being public business, it has always been customary for the reporters for at least one paper, generally two or three, to take minutes of the meetings. I have always kept a scrap-book which I use as a sort of supplement to my record. The "Oregonian" of September 8th. (Here the witness produced an extract purporting to be from the "Oregonian.")

Mr. MALLORY.—I object to the witness reading anything from the "Oregonian."

Q. What I want you to explain is whether any communications had been made to Mr. Hoffman at the time when it was ascertained these funds would be on hand.

A. Yes, one time.

Q. That is the one I want.

A. The only communication was that I sent word to him that the funds had unexpectedly arrived that day, and I had his warrant for the full amount, some \$66,000.00, ready for him

on the 20th of September. On the 19th of September I drew warrants in favor of all the contractors for 30 per cent, being the total amount of money the committee could pay on its different contracts, and on the 19th, in the evening of that day, Harris & Co., of Chicago, telegraphed the water committee that they would furnish \$100,000.00. The warrants that I had drawn were not given to the contractors, but were canceled, and warrants for the full amount according to contract issued and paid in their place.

Q. Referring to "Exhibit No. 4," I will ask you to state whether or not the items therein listed as based upon extra work represent the gross allowance for such work, or is there a percentage held on them as well as on the original contract.

A. No percentage on the extra work.

No cross-examination.

Witness excused.

Mr. McMULLEN now resumes the stand.

Cross-Examination (Continued).

Questions by Mr. R. MALLORY:

Q. I will show you a letter, dated San Francisco, March 20th, 1893, addressed to Lee Hoffman, and ask you if that is your signature attached to that letter.

A. That is my signature.

Q. And the postscript? A. Yes, all of it.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit H," G. A. B., Ex.)

Q. I show the witness a letter, dated San Francisco, March 18th, 1893, and the signature thereto, and I ask whether that is your signature.

A. The signature is mine.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The letter referred to is received and filed, marked "Defendant's Exhibit I," G. A. B., Ex.)

Q. I show witness a letter dated San Francisco, March 24th, 1893, addressed to Lee Hoffman, and ask whether the signature attached to that letter is your signature.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit J," G. A. B., Ex.)

Q. I show the witness a letter dated San Francisco, March 27th, 1893, and the signature, and I ask whether it is your genuine signature.

A. The signature is genuine.

(Counsel for defendant offers in evidence the letter last shown the witness, and the same is received and filed, marked "Defendant's Exhibit K," G. A. B., Ex. No objection.)

Q. I show witness a letter, dated San Francisco, April 30th, 1893, addressed to Lee Hoffman, signed John McMullen, and ask if that is your signature.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit L," G. A. B., Ex.)

Q. I show witness a letter, dated San Francisco, April 18th, 1893, and ask if the signature thereto is your genuine signature? A. It is.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit M," G. A. B., Ex.)

[282] Q. I show you a letter, dated San Francisco, April 22, 1893, and the signature thereto, and ask you if that is your genuine signature. A. The signature is genuine.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit N," G. A. B., Ex.)

Q. I show you a letter, dated San Francisco, May 12th, 1893, and ask if the signature is your genuine signature.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit O," G. A. B., Ex.)

Q. I show you a letter, dated San Francisco, May 18th, 1893, and ask you if that is your genuine signature attached to that letter. A. It is genuine.

(Counsel for defendant offers in evidence the letter last shown the witness. Counsel for complainant objects to this letter as being irrelevant in respect to everything therein contained except the paragraph, "Have you heard from Foy yet. How does it look for starting the work early in June?" The letter referred to is received and filed, marked "Defendant's Exhibit P," G. A. B., Ex.)

Q. I show witness a letter, dated San Francisco, June 6th, 1893, and ask if that is his signature. A. It is.

(Counsel for defendant offers in evidence the letter last shown the witness. The same is received and filed, marked "Defendant's Exhibit Q." Counsel for complainant objects to the passage contained in this letter commencing with "with regard" and terminating with "you think it will take," to the money matters next to the last paragraph on the second page, on the ground that it is immaterial.)

Q. Witness is shown a letter, dated San Francisco, June 15th, 1893, and is shown the signature, and is asked if that is his genuine signature. A. It is.

(Counsel for defendant offers in evidence the letter last shown the witness. Complainant objects to the 1st, 2nd, and 3d paragraphs on the second page of the letter, on the ground that the matter therein contained is immaterial. The letter referred to is received and filed, marked "Defendant's Exhibit R," G. A. B., Ex.)

Q. Witness is shown a letter, dated San Francisco, July 6th, 1893, and asked whether the signature thereto is his genuine signature. A. It is.

(Counsel for defendant offers in evidence the letter last shown the witness. Complainant objects to the subject matter of this letter commencing with the words, "Now, Lee as to finances." near the bottom of the first page, and concluding with the words, "We will do our part towards executing it." on the 3d page, on the ground that the same is immaterial. The letter referred to is received in evidence, filed, and marked "Defendant's Exhibit S," G. A. B., Ex.)

Q. There is a postscript to this letter which is signed by you, is that your genuine signature? A. Yes.

(Counsel for defendant offers in evidence the postscript to the letter above introduced. Objected to by complainant on

[284] the same ground made above to a portion of the letter, and on the ground that it is irrelevant. The postscript referred to is received in evidence, filed, and marked "Defendant's Exhibit S," G. A. B., Ex.)

Thereupon the taking of testimony herein is adjourned until Monday, Jan. 13th, at 10 A. M.

Office of Geo. A. Brodie, U. S. Examiner, Portland, Oregon.

January 18th, 1896, 10 o'clock, A. M.

At this time appears the complainant herein by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

Mr. JOHN McMULLEN resumes the stand for further

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. I show the witness a letter, dated San Francisco, July 22d, 1893, and ask if the signature is his genuine signature.

A. Yes, the signature is genuine.

(Counsel for defendant offers the letter referred to in evidence; objected to by counsel for complainant, and portions objected to commencing with the second line from the bottom of the second page, and concluding with the third line from the bottom of the third page, on the ground that all of said [285] portion is immaterial; the letter referred to is received and filed, marked "Defendant's Exhibit T," G. A. B., Examiner.)

Q. The witness is shown a letter, dated San Francisco, July 24th, 1892, and I would ask if the signature, "San Francisco Bridge Co.," by John McMullen, President, is your genuine signature.

A. Yes, sir.

(The letter referred to is offered in evidence; objected to on the ground that the same is immaterial; the same is received and filed, marked "Defendant's Exhibit U," G. A. B., Examiner.)

Q. I show the witness a letter, dated August 3d, 1893, and ask whether the signature is your genuine signature.

A. Yes, sir.

(Counsel for defendant offers the letter referred to in evi-

dence; objected to as immaterial; the same is received and filed, marked "Defendant's Exhibit V," G. A. B., Examiner.)

Q. I show the witness a letter, dated San Francisco, August 4th, 1893, and ask you whether the signature is your genuine signature. A. Yes, sir.

(The counsel for defendant offers the letter referred to in evidence.)

Mr. COX.—I object to paragraph on 2nd page, commencing with the words, "I hope the committee," on the ground that it is immaterial, and I object to the portion of the letter commencing with the last line of the 2nd page down to and including the words, "our camp," near the bottom of the 3d page, on the ground that it is irrelevant, and I object to the portion of the letter succeeding the passage last objected to, to its conclusion, on the ground that it is immaterial. (The
286] letter is received and filed, marked "Defendant's Exhibit W," G. A. B., Examiner.)

Q. I show the witness a letter dated San Francisco, September 14th, 1893, and ask whether the signature is the witness' genuine signature. A. Yes, sir.

(The letter referred to is offered in evidence.)

Mr. COX.—I object to the paragraph near the bottom of the page 2, commencing with the words, "My own finances," down to and including all that paragraph on the 3d page, and the paragraph at the bottom of the 3d page, commencing with the words, "I have heretofore," down to the conclusion of that paragraph on the grounds that it is immaterial. (The letter referred to is received and filed, marked "Defendant's Exhibit X," G. A. B., Examiner.)

Q. The witness is shown a letter, dated San Francisco, September 18, 1893, addressed to Lee Hoffman, and I show the signature to the witness, and ask the witness if that is his genuine signature. A. It is.

(Counsel for defendant offers the letter referred to in evidence; no objection; the same is received and filed, marked "Defendant's Exhibit C2," G. A. B., Examiner.)

Q. Are you acquainted with the signature of Lee Hoffman?

A. Yes, sir.

Q. The witness is shown a letter, dated Portland, Oregon.

January 23, 1893, and shown the signature, and I ask the witness if he knows whose signature that is.

A. Yes, sir, that is Lee Hoffman's.

Q. I will ask you if this letter was received by you at San Francisco, in due course of the mail. A. Yes, sir.

[287] (Counsel for defendant offers the letter referred to in evidence; objected to as immaterial, and not proper cross-examination; the letter is received and filed, marked "Defendant's Exhibit Z," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, January 30th, 1893, addressed to John McMullen, and signed Lee Hoffman, and ask you if you know whose signature that is.

A. Yes, it is the signature of Lee Hoffman.

Q. I ask if this letter was received by you in due course of mail, at San Francisco. A. Yes, sir.

(Counsel for defendant offers the letter referred to in evidence, also the paper attached thereto objected by counsel for complainant on ground as above stated; the same is received and filed, marked "Defendant's Exhibit A2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, February 3, 1893, addressed to J. McMullen, and asked if the signature is the genuine signature of Lee Hoffman.

A. It is.

Q. I ask if that letter was received by you in due course of mail, at San Francisco. A. It was.

(Counsel for defendant offers in evidence the letter referred to; same objection; the same is received and filed, marked "Defendant's Exhibit B2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland Oregon, February 8, 1893, addressed to J. McMullen, San Francisco, signed by Lee Hoffman, and I ask if it is the genuine signature of Lee Hoffman. A. Yes, sir.

[288] Q. Was it received by you at San Francisco in due course of mail? A. Yes, sir.

(Counsel for defendant offers the letter referred to in evidence; same objection; the letter is received and filed, marked "Defendant's Exhibit C2," G. A. B., Examiner.)

Q. I show the witness a letter, dated Portland, February 11, 1893, addressed to J. McMullen, San Francisco, and is

shown the signature, and I ask if that is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. I will ask you if you received that letter in due course of mail, at San Francisco. A. I did.

(Counsel for defendant offers in evidence the letter referred to; same objection; the letter is received and filed, "Defendant's Exhibit D2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, March 10, 1893, addressed to J. McMullen, San Francisco, California, and signed Lee Hoffman, and I ask if you know whose signature that is.

A. Yes, it is Lee Hoffman's signature.

Q. Was this letter received by you in due course of the mail, at San Francisco? A. Yes, sir.

(Counsel for defendant offers the letter referred to in evidence; counsel for complainant objects to the 2nd paragraph from the end of the 1st page, commencing with "Hope that," and the 1st, 2nd, and 3d paragraphs of the 2nd page, on the ground that the matters therein contained are irrelevant; the letter is received and filed, marked "Defendant's Exhibit E2," G. A. B., Examiner.)

Q. I show the witness a letter, dated Portland, Oregon, March 21, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman and would ask if that is his genuine signature. A. Yes, sir.

Q. Did you receive this letter in due course of the mail at San Francisco? A. I did.

[289] (Counsel for defendant offers in evidence the letter referred to; no objection; the same is received and filed, marked "Defendant's Exhibit F2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, March 27, 1893, addressed to J. McMullen, San Francisco, California and signed Lee Hoffman, and I ask if that is the genuine signature of Lee Hoffman.

A. Yes, sir, it is.

Q. Did you receive that letter in due course of the mail, at San Francisco? A. I did.

(Counsel for defendant offers the letter referred to in evidence; no objection; the same is received and filed, marked "Defendant's Exhibit G2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, April 3, 1893, addressed to J. McMullen, San Francisco, California, and shown the signature, and asked if he knows whether that is the genuine signature of Lee Hoffman.

A. Yes, sir, it is.

Q. Did you receive that letter in due course of mail at San Francisco? A. Yes, sir, I did.

(Counsel for defendant offers the letter referred to in evidence; no objection; the same is received and filed, marked "Defendant's Exhibit H2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, April 14th, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and asked if that is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. Did you receive that letter in due course of the mail, at San Francisco? A. I did.

(Counsel for defendant offers in evidence the letter referred to; no objection; the same is received and filed, marked "Defendant's Exhibit I 2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, April 20, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and asked if that is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. I ask you if you received that letter in due course of the mail at San Francisco? A. Yes, sir.

(Counsel for defendant offers in evidence the letter referred to; no objection; the same is received and filed, marked "Defendant's Exhibit J2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, May 1, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and I ask you if that signature is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. I ask you if that letter was received by you in due course of the mail, at San Francisco? A. It was.

(Counsel for defendant offers the letter referred to in evidence; no objection; the same is received and filed, marked "Defendant's Exhibit K2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, June 9, 1892, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and the witness is asked if the

signature of Lee Hoffman is the genuine signature of Lee Hoffman. A. It is.

Q. To this letter is attached a schedule of prices, and is addressed to J. McMullen, Esq.; was this letter received by you in due course of the mail at San Francisco?

A. It was.

[1] (Counsel for defendant offers in evidence the letter and schedule attached; no objection; the same is received and filed, marked "Defendant's Exhibit L2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, June 20th, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and asked if the signature is the genuine signature of Lee Hoffman. A. Yes.

Q. I ask whether this letter was received by you in the due course of mail, at San Francisco. A. It was.

(Counsel for defendant offers in evidence the letter referred to; no objection; the same is received and filed, marked "Defendant's Exhibit M2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, July 17th, 1893, addressed to John McMullen, San Francisco, California, signed Lee Hoffman, and asked whether the signature of Lee Hoffman is his genuine signature.

A. Yes, sir.

Q. I ask whether you received that letter in due course of the mail at San Francisco. A. I did.

(Counsel for defendant offers in evidence the letter referred to; counsel for complainant objects to that portion of the letter commencing with the words, "I am not finding fault," about the middle of the 2nd page, down to the conclusion of paragraph in which said words occur, on the ground that the matter therein contained is immaterial. The letter is received and filed, marked "Defendant's Exhibit N2," G. A. B., Examiner.)

[2] Q. The witness is shown a letter, dated Portland, Oregon, July 20th, 1893, addressed to John McMullen, San Francisco, California, signed Hoffman, "Bates, per Lee Hoffman," and I ask you if the signature of Lee Hoffman is his genuine signature. A. Yes, sir.

Q. Was this letter received in due course of the mail at San Francisco? A. It was.

(Counsel for defendant offers in evidence the letter referred

to and the same is received without objection, and marked "Defendant's Exhibit O2," G. A. B., Examiner.)

Q. The witness is shown a press copy of letter dated July 31, 1893, addressed to John McMullen, San Francisco, California, and signed Lee Hoffman, and I ask you whether the signature is the genuine signature of Lee Hoffman.

A. It is.

Q. I ask you whether the original of this press copy was received by you in due course of mail, at San Francisco?

A. It was, I think.

(Counsel for defendant offers in evidence the letter referred to; counsel for complainant objects to all of this letter except the first paragraph, on the ground that the matters therein contained are immaterial; the letter referred to is as follows, and is marked by the examiner "Defendant's Exhibit P2," G. A. B., Examiner.)

"July 31, 1893.

JOHN McMULLEN, Esq., 42 Market Street, San Francisco, Cal.

Dear Sir: I send you to-day under separate cover specifications and profile plan for the submerged pipe. The reason I did not send it sooner was that I had no profile of the river, and Colonel Smith told me he had sent you specifications. I have not paid any attention to it yet; as things now look, I don't think I shall bid on it.

Now, Mac. I want to tell you once more about the money matters up here. I have now put into this thing \$15,100 in cash, and to-morrow there will not be a dollar left if we pay our bills as we always have done heretofore. Now, there is no use of your repeating the proposition to borrow money up here, as your bridge stock and all the collateral I have got with our notes attached would not borrow \$20,000.00, nor would I undertake to raise \$5,000.00 here now, nor could we have done it within the last forty days. It is a good deal for you to ask of me, to take this work and run it and furnish all the money, and not do anything else. You are taking work all over the country, putting your money into other work, and I cannot do anything but set here and manage this job.

The water committee have not yet sold their bonds, and if they should fail to sell them, I would have not less than \$20,-

000.00 to pay for work performed this month. Now Mac., I am willing and ready to live up to my agreement in this contract, and you must do the same. I don't feel as if I was treated right in this matter; we went into this thing together; you agreed to put up your part of the money, and I agreed to put up my portion, and arranged for it. If you will put in \$8,000.00 cash, in addition to the plant furnished, I will try and carry the work along, but this amount I must have not later than the 5th, as I must use part of my money in other places by that time.

Please let me hear from you on receipt of this.

Yours truly,

LEE HOFFMAN."

- 4] Q. The witness is shown a letter, dated Portland, Oregon, September 11, 1893, addressed to J. McMullen, San Francisco, and signed Lee Hoffman, and is asked if the signature is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. Was this letter received by you in due course of the mail, at San Francisco? A. It was.

(Counsel for defendant offers the letter referred to in evidence; objected to as immaterial; the same is received and filed, marked "Defendant's Exhibit 'Q2', G. A. B., Examiner.")

Q. The witness is shown a letter dated Portland, September 16th, 1893, addressed to J. McMullen, Esq., San Francisco, signed Lee Hoffman, and asked whether the signature is the genuine signature of Lee Hoffman.

A. Yes, sir.

Q. Was this letter received by you in due course of the mail, at San Francisco? A. It was.

(Counsel for defendant offers in evidence the letter referred to; same objection; the same is received and filed, marked "Defendant's Exhibit 'R.2.' G. A. B., Examiner.")

Thereupon the further examination of this witness is adjourned until 2 o'clock P. M., January 18th, 1896.

[Signed]

GEO. A. BRODIE, Examiner.

[295] Afternoon session, January 18th, 1896, 2 o'clock P. M. Present, the same parties as before.

JOHN McMULLEN resumes the stand.

Cross-Examination. Continued by Mr. R. Mallory.

Q. Yourself and Mr. Hoffman commenced figuring upon this work of building the waterworks from Bull Run to Portland several months before the contract was let, did you not?

(Same objection.)

A. We did.

Q. One of the principal considerations for your figuring together was that you did not either feel like handling so large a contract alone?

A. Well, I don't think that was the principal consideration; that undoubtedly was something of a consideration, but I think the principal consideration was that we considered that our chances of getting it together were better than the chance of either separately.

Q. You thought you would reduce competition by joining in your bid?

A. No, that is not the point; the point is that we would have the benefit of the judgment of each, and the ability, judgment and experience of each in securing the work and ascertaining the cost of it.

Q. But didn't you expect by combining your bids into one, you would to that extent cut off competition between yourself and Mr. Hoffman?

[296] A. That would be a natural result; when we agreed to go together, of course, we were not in competition.

Q. Wasn't one of the reasons assigned by you for wishing to take the contract with him, that you were a nonresident, and preferred to have somebody here to look after the business rather than look after it yourself?

A. I don't think I ever made such a statement to Mr. Hoffman; the fact is, that it was Mr. Hoffman that approached me to go in with us, or to go in with the San Francisco Bridge Company.

Q. There had been some effort in the direction of constructing the waterworks in this city prior to this time, had there not? A. There had.

Q. At that time the San Francisco Bridge Company was one of the bidders on the contract?

A. That is correct; it was the lowest bidder.

Q. The San Francisco Bridge Company was the lowest bidder?

A. Yes, sir.

Q. But the contract was not awarded at that time?

A. That is right, because they were unable to sell the bonds, I think.

Q. While you and Mr. Hoffman were figuring upon this work, you figured also upon the submerged pipe for taking the water across the Willamette river, did you not?

(Objected to as immaterial.)

A. We did

Q. And that was considered by you as belonging to the same transaction that you were concerned in?

(Same objection.)

97] A. That was one of the sections of the work advertised by the water committee at the time that we secured the contract for the manufacturing and laying of the pipe.

Q. You had figured together with a view of bidding together on that as well as the other?

A. We had.

Q. That was included as much as anything else between you in the partnership for all that was said between you on that subject, prior to the execution of the contract, Exhibit No. 1, was it not?

A. Whatever was done prior to the signing of the partnership agreement it was in the same condition as the job was secured; the submerged pipe in our negotiations with each other was in the same status as this relating to the pipe lines proper.

Q. It was a part of your understanding in your contract that you should take and share whatever other contracts might be let in connection with this water system, was it not?

A. That is correct, sir.

Q. As a matter of fact, you and Mr. Hoffman did not submit any bid for the submerged pipe, did you?

A. We did.

Q. Did you submit a bid together, you and Mr. Hoffman, for the submerged pipe?

A. Well, we were interested together in the bid that was submitted.

Q. Is it not a fact that Mr. Hoffman notified you that he would not have anything to do with the submerged pipe?

A. That was at the subsequent letting.

[298] Mr. MALLORY.—The subsequent letting is what I referred to.

(Counsel for complainant objects to the last interrogatory as well as all the preceding interrogatories upon the same subject matter, upon the ground that the same is immaterial.)

Q. Was a bid submitted by yourself and Mr. Hoffman for the submerged pipe work at the time you submitted your bids for the manufacturing and laying of the other pipe?

A. There was a bid submitted by Mr. Hoffman in which we were jointly interested.

Q. Mr. Hoffman submitted that bid, did he?

A. Well, I think the bid would be the best evidence of that; I don't know whether it was bid in his name or in the name of the San Francisco Bridge Company; that is the bid that we desired to take the work on.

Q. Was the submerged pipe a portion of this work?

A. What do you mean by "this work"?

Q. I mean of the water system bringing Bull Run water to Portland.

A. Yes, it was; that is, of the whole work, but not of the manufacturing and laying of the pipe.

Q. It was a part of the whole work—the whole system?

A. Yes, sir.

Q. Now did you, or Mr. Hoffman, or did both of you submit a bid for the submerged pipe portion of the work at the time the other bids were submitted for the manufacture and laying of the pipe?

A. We did.

[299] Q. Were any other bids submitted except yours?
(Objected to as immaterial.)

A. I think there were several; I think there were seven or eight bids submitted.

Q. Was not the work of manufacturing and laying the submerged pipe let as a result of those bids?

A. It was not.

Q. Was it or not afterwards offered and other bids received?

A. It was.

Q. At the second letting did yourself or Mr. Hoffman submit any bids?

(Same objection.)

A. I would have to look up the records; i could not tell you; I don't think that I was in Portland at the second letting. I think I furnished Mr. Hoffman what data and information I had relative to it, and I relied on him to put in a bid; that is my present opinion.

Q. Is it not a fact that Mr. Hoffman notified you that he would have nothing further to do with the work of manufacturing and laying the submerged pipe?

(Same objection.)

A. I don't think that is the fact.

Q. And didn't you, on your own account, without any reference to Hoffman, afterwards submit a bid for that work at the time of the second letting?

(Same objection.)

A. I cannot state without looking up the records about that. My present opinion is, though, that I did not, as I stated in answer to a former question.

Q. But the fact is, is it not, that Mr. Hoffman took active control of this whole business, and your portion of it, whatever you did, was simply advisory?

0] A. No, that is not correct.

Q. I mean so far as any work you did directly connected with the execution of the contract on the ground?

A. Well, when you limit it to on the ground, yes.

Q. The work you did consisted chiefly in procuring data, and advising ways and means for getting the contract in the first instance, and in advising and looking after matters in San Francisco and elsewhere, such as would need attention there, was it not?

A. That is substantially correct, with this addition, that I frequently came to Portland and conferred personally with Mr. Hoffman, and he frequently took me out on the work along the line, that I might make any suggestion that I deemed expedient.

Q. Mr. Hoffman notified you, did he not, that he had a large amount of money involved in the work, and wanted you to put in your share?

(Objected to by complainant as irrelevant and immaterial.)

A. Well, we differed—

Q. Just answer my question, please.

A. Well, perhaps that is correct; it ought to be qualified, but you don't seem to desire to have it qualified.

Q. You did not put in any money other than that you have already testified to—the plant that came from Seattle, some money for a hydraulic punch and shears and for some portable forges?

(Same objection.)

A. We also paid Mr. Clemens Hirshell's bill for his advice in connection with the contract.

Q. (Continued.) And the sum paid to Mr. Hirshell?

[301] A. Those are the principal items; there were some other small items—my personal traveling expenses when I came to Portland, telegram accounts, and matters of that kind.

Q. When Mr. Hoffman asked you to put up ten thousand dollars, about the 16th of September, 1893, you did not put up that sum of money, did you?

(Same objection.)

A. I did not.

Q. He then informed you that unless you put it up he would not further recognize you as a partner in that contract, did he not?

(Same objection.)

A. Well, not exactly in that language, no, sir.

Q. Well, if he did not in that language, did not he so notify you in effect?

(Same objection.)

A. I think that is correct.

Q. He did not after that, did he, allow you any access to the books or consult with you further about it?

A. He did consult with me after that, yes, sir.

Q. When?

A. At the time that the contract was let for the distributing system in the city; the date of that letting, I think, was in September; I was here for several days at that time, and we had a general talk; he did not, at that time, on that occasion, deny my interest in the premises; he felt very cheerful and happy then, because he had received enough money from the city to reimburse him for all that he had invested in it, and to carry the job on, and pay all its liabilities, and have a surplus of

302] some ten to eleven thousand dollars to the credit of the firm on the books.

Q. You are answering more than I asked for, Mr. McMullen. I simply asked you when it was you had this conversation?

A. I cannot give you the date of that conversation, but I can establish it later.

Q. These conversations that you had with him were all here in Portland? A. Yes.

Q. Who was present?

A. I don't think anybody was present when we talked our private business over; we had several talks.

Q. Is it not a fact, Mr. McMullen, that after your failure to put up ten thousand dollars, as he requested you to do in his letters to you of September 11th and 16th, that he refused thereafter to recognize you as a partner in this business?

A. That is not true.

Q. I will ask you if later than that, sometime in December of that year, or the year 1894, I don't remember which—

The WITNESS.—It was December, 1893.

Q. (Continued.) You did not apply to him for access to the books, and if he did not refuse to give it to you, and deny your interest in it altogether?

A. He refused to let me see the books, but he did not deny my partnership interest.

Q. He refused to give you any information?

A. He refused to give me access to the books.

Q. You say that he acknowledged your rights as a partner, but refused to allow you to see the books, is that what you say?

303] A. That is what I say, exactly, coupled with that a demand that I should name a price for which I should sell out my interest in the contract, which I declined to unless I could see the books first.

Q. Your correspondence with him concerning this business ended about the 20th of September, did it not?

A. It did.

Q. The frequent letters that had been passing between you prior to that date, concerning the business and the conduct of it ceased after that; is that correct?

A. That is correct, sir.

Q. He conducted the business without advising you, and without your advice to him from that time forward?

(Objected to as immaterial.)

A. That is substantially true, with the exception of the time that I was in Portland.

Q. And that was the time that you talked to him about the distributing system?

A. No, I simply referred to the distributive pipes in Portland to fix the time that he last conferred with me relative to our contract on the pipe lines, and prior to the conference of December 4th.

Q. What is the nearest date that you can fix as to the time when that occurred?

A. I think it was in September; may have been October, but I can get the date to-morrow, I think.

Q. Whatever interest Mr. Hoffman recognized you as entitled to in this contract referred to what had occurred prior to the 16th of September, did it not?

[304]

(Objected to as incompetent and immaterial.)

A. Is that the way you want the question, judge? I don't quite apprehend it.

Q. Well, I will make it so you can understand it. You say Mr. Hoffman, in the conversation you had with him after the 16th of September, and either some time in the month of September or in October, Mr. Hoffman did not deny your interest in the contract; did he not refer to such interest as might have accrued to you prior to the 16th of September?

(Same objection.)

A. I don't know.

Q. Did he not state to you at that time that whatever interest had accrued to you in that contract prior to what he claimed was its dissolution he would be willing to pay you what was fair compensation?

A. He never did.

Q. And was not that what he referred to when he proposed to buy you out?

(Objected to as immaterial.)

A. I did not understand that he had any such thought in his mind.

Q. Did he not tell you at that time in this conversation that you had entirely failed to come up to your part of the contract?

A. He did not.

Q. (Continued.) And to put up the money as you had agreed to?

A. He did not.

Q. He made no reference to those things?

(Objected to as immaterial.)

A. He did not.

[305] Q. When you and Mr. Hoffman were figuring upon the bid that you finally put into the water committee, you also figured upon the bid that you were to submit in the name of the San Francisco Bridge Company, did you not?

A. We did not.

Q. Did not? A. No.

Q. You had no figuring with him or understanding with him about the bid that the San Francisco Bridge Company was to put in, did you?

A. I did not, none at all; the only bid that we agreed to was the bid that went in in Mr. Hoffman's name.

Q. He did not know that you were going to put a bid in for the San Francisco Bridge Company, did he?

A. Oh, yes.

Q. How did he find that out?

A. Well, I think I told him so; I told him that I did not want to come up here and go home again without putting in a bid, and, for appearance sake, I wanted to put in a bid.

Q. Did you show him the bid?

A. I don't think so.

Q. Do you swear that you did not?

A. Yes, I swear that I did not.

Q. You swear that you did not? A. Yes.

Q. Mr. McMullen, is it not a fact that you arranged that bid with Mr. Hoffman purposely, so that it should overbid the amount of the other bid that you and he had.

A. The fact is—

Q. Just answer that question. -A. No, sir.

[306] Mr. COX.—You can now make what explanation you want to.

The WITNESS.—The explanation is this; There was only one bid agreed upon between Mr. Hoffman and myself, and that was the bid in which we both were interested in, and which was put in in the name of Hoffman & Bates; the other bid referred to by Mr. Mallory is the bid put in by the San Francisco Bridge Company, some forty or fifty thousand dollars higher than the bid that we proposed to take the job on, and was put in simply to keep the San Francisco Bridge Company's name before the public, and for the further purpose that all the contractors knew that the San Francisco Bridge Company was here, and would think it strange if we did not put in a bid. Mr. Hoffman did not care anything about the bid, nor did the San Francisco Bridge Company care anything about it, but it was put in as a pure matter of form. We knew it would be too high, and that is absolutely the truth about that bid as I know it to be.

Q. Is it not a fact that you and Mr. Hoffman agreed together to make the aggregate of the bid of the San Francisco Bridge Company more than the aggregate of the bid of Hoffman & Bates?

A. No, sir, Mr. Hoffman had nothing to do with the San Francisco Bridge Company's bid, and it was put in by the San Francisco Bridge Company for the purpose as I have stated, and Mr. Hoffman cared, or knew, or had nothing to say, about it.

Q. Is it not also a fact that the bid of Hoffman & Bates for the manufacturing and laying of the pipe was \$465,667.00, is it not?

A. I think that is correct, sir.

[307] Q. They also put in a bid for the steel plates for the pipes, and that bid was \$359,278.80, was it not?

A. I don't know, sir.

Q. And for bridges there was bid \$33,562.94; do you know about that?

A. I don't know, sir.

Q. Is that correct?

A. I don't know; I think that could be better proved by the books of the water committee.

Q. The head works was \$17,080.00, is that correct?

A. I cannot remember about those.

Q. The San Francisco Bridge Company submitted a bid for the manufacture and laying of the pipes for \$514,664.00, wasn't it?

A. I don't know; I presume that is correct, though.

Q. And for steel plates for pipes, \$348,781.00?

A. I don't know; I presume that is the sum.

Q. And for bridges, \$31,297.07?

(Counsel for complainant objects to all of this evidence, on the ground that it is incompetent.)

A. I don't know.

Q. For head works, \$16,550.00?

(Same objection.)

A. I don't know.

Q. Was not the understanding between you and Mr. Hoffman, that while your bid for manufacturing and laying pipe was \$514,664.00 and the bid of Hoffman & Bates was \$456,656.00, you made the bid of the San Francisco Bridge Company on all of the other work less than the amount named in the bid of Hoffman & Bates?

[308] A. The low bid of either Hoffman or the San Francisco Bridge Company was the joint bid in all cases, and other bids that may have been put in by either parties, as I said before, we had no interest in; it was simply put in to let other people know that both parties were represented here, as the water committee and the engineers and contractors all knew that both parties were represented here. The higher bid was simply put in to let the name of that firm appear as a bidder, and we had no interest in it, and we did not care anything about how much it was, and by "we" I mean Mr. Hoffman and myself. The high bid was put in simply to allow the firm putting it in to be represented at the bidding.

Q. Now, was it not agreed and understood between yourself and Mr. Hoffman that, if when these bids should be opened, Hoffman & Bates should get the contract for manufacturing and laying the pipe, and the bid of the San Francisco Bridge Company should be the next lowest on the other items, and the bid of Hoffman & Bates should be the next lowest to them, or above them—that in that case, the San Francisco Bridge Company would refuse to accept the award to them, if it were made to them, and all effort should be made that

could be made to induce the water committee to take the contract at the rate named in the bid of Hoffman & Bates?

A. That is absolutely untrue; it is more than that, it is idiotic; these bids were accompanied by a check, I think, to the amount of \$25,000.00, to carry out the contract, and we would have to sacrifice that check to get the price of about—according to the items in the question—\$14,000.

Q. I simply ask the fact whether there was not such arrangement as that?

[309] A. No, sir, there was no such arrangement; I don't think that anybody ever told you that there was ever any such arrangement.

Q. I don't think, Mr. McMullen, that there is any question of veracity between you and I; I am not arguing the question.

A. There was no such arrangement.

Q. As a matter of fact, there was no award made to the San Francisco Bridge Company upon the bid they put in, was there?

A. No, sir.

Q. It is a fact, Mr. McMullen, is it not, that Mr. Hoffman knew, when he put in this bid in the name of Hoffman & Bates that you were to put in one in the name of the San Francisco Bridge Company, and that the bid that you were to put in would not be a competing bid to the one which you and he had agreed upon?

A. I think that is correct.

Redirect-Examination.

Questions by Mr. L. B. COX:

Counsel for complainant wishes it to be understood that all interrogatories addressed to this witness or other witnesses relative to matters which transpired prior to the execution of "Complainant's Exhibit No. 1" are contingent upon the Court's ruling when the cause shall be reported from the examiner, as to the materiality of such testimony offered by the defendant.)

Q. Mr. McMullen, when did the matter of joint action between yourself and Mr. Hoffman in regard to the waterworks of the city of Portland under consideration first come up?

[310] A. It first came up several years before this job was awarded when the bids for building the Bull Run pipe line were taken, I think, in 1887, after we were the lowest bidder. At

that letting Mr. Hoffman came to me and congratulated me, and said that we made a bold, good bid, and that he did not think we knew so much about pipe lines, and said that he was sorry that it was not going to go through; I think it was Governor Pennoyer that vetoed the bonds; he said, "When this thing comes up again, Mac, we must go in together, and see if we can't get it," and we frequently talked during the time that intervened between that occasion and December, 1892, when again negotiations were actively commenced, and it was understood the water committee were going to let the contract early in the spring.

Q. Now, what do I understand from answers you have given to cross-interrogatories as to the amount of money which Hoffman was estimating as the basis of his bid at the time you were brought into contact with him when you came to Portland, about the 1st of March, 1893—I mean the bid for manufacturing and laying of steel pipe; was it greater or less than the amount of the bid which afterwards put in in the name of Hoffman & Bates?

A. When we came together to compare items in the estimate, he was generally higher than we were.

Q. How was the bid which was finally put in in comparison with the figures that you found Mr. Hoffman had under consideration when you and he were first brought into contact on this occasion?

A. I think it was perhaps \$20,000.00 lower.

Q. Which was lower?

A. I think the bid which was finally put in was lower than the estimate that he favored.

Q. At whose instance was the reduction made?

A. It was made at my instance.

Q. In what shape were the figures which you brought from San Francisco with you at the time you arrived in Portland?

A. Well, the figures showed the quantities and showed the prices that we had got on the different items from the east—from our representative in the east—and also showed the prices that we put formally on the same work several years before, and I brought all the correspondence that we had up to that date, and out of the correspondence we took the items and tabulated them.

Q. What I mean is, were they of such a definite character that you could have acted upon them in preparing bids or submitting bids?

A. No, they were not; they were constantly being changed; we were daily receiving additional advices both from the east and from San Francisco.

Q. Explain what changes were necessitated by these advices of which you spoke.

A. Well, sometimes it raised the items under consideration, and sometimes it lowered them.

Q. What was the character of the advices; how would the advices you got apply to the matters you had under consideration?

A. Well, we were estimating, for instance, the cost of the plant to punch and rivet the iron for this pipe line, and the estimate that we had on this machinery when I came to Portland was an estimate that we had got from machine-shops in [312] San Francisco, and perhaps from some other place, but when I got to Portland I got other advices from our New York office that were much more favorable as to cost of machines to do the riveting and punching, and rolling and bending for doing that work. In other words, the prices that we had when I came to Portland on the different items were largely our own judgment, and such information as we had been able to get in San Francisco, while the prices that we had just prior to putting in this bid were obtained from information gotten in San Francisco, and additional information telegraphed us, or written us by the New York office.

Q. Do you remember how many bids, all told, there were upon this portion of the work?

(Objected to as immaterial.)

A. I think there were seven or eight.

Q. You stated in your direct examination, in answer to an interrogatory in explanation of the action between Mr. Hoffman and yourself that there was no definite, final estimate arrived at, except the one that was put in the bid, but other estimates were made jointly, and when you came to Portland you brought all the data and so forth, that you had, and Hoffman produced all that he had—do you mean to say that this estimate had been made jointly or separately?

A. I mean that the estimate that was subsequently embodied in the bid was made jointly; that is, we both assented that we would agree to take the job for that amount of money.

Q. But you had, you and Hoffman had, made an estimate upon the matter separately? A. Yes, sir.

[313] Q. Had figured on it?

A. Yes, had figured on it separately, that is, separately in the sense that he was getting information and using his judgment, and I was getting information and using my judgment, and when I got to Portland, we throwed our joint information and judgment into one final estimate to win the job on.

Q. I will ask you some questions in regard to what took place after Mr. Hoffman and yourself had executed the contract, "Complainant's Exhibit No. 1"; you have been asked something about the presenting of a bill from Hoffman to the San Francisco Bridge Company, I think, for the plant; I don't mean to say a bill, but a check sent by Hoffman to the San Francisco Bridge Company, I think for a plant which was sent down from Seattle, and was owned by the San Francisco Bridge Company. I will ask you to state at the time this check was sent in, if you know, was it prior to or subsequent to the 20th day of September, 1893?

A. It was long after that; I think it was in January, 1894.

Q. I will ask you to state whether or not you ever gave any different answer to the proposition made by Mr. Hoffman in his letter, "Defendant's Exhibit R2," where he notified you that if you did not put up \$10,000.00 by the 20th of September, he would not longer consider you a partner in the contract, except the answer you gave in your letter, "Defendant's Exhibit No. Y." dated September 18th?

A. That was the only answer I ever gave him.

[314] Q. I would ask you to state if you ever agreed with Mr. Hoffman at any time that the partnership between you and himself should be determined as of that date?

A. Never did; I never proposed that it should be other than in that letter.

Q. You have stated something about having conversations with Hoffman in September, 1893; I understood you to say, when, in connection with the matter of distributing the water in the city of Portland, the work of manufacturing and laying

the steel pipe was also discussed between you; was that in 1893 or 1894?

A. That was in 1893; that was the first time I saw him after he wrote the letter of the 16th of September.

Q. Then you stated that in December—

The WITNESS.—That was the second time that I saw him after he wrote that letter.

Q. (Continued.) Then you stated that in December you made a demand on him for an inspection of the books, and a statement as to the condition of the work?

A. That is correct, sir.

Q. Was that in 1893 or 1894? A. That was in 1894.

Q. And you may state succinctly what his response was.

A. It was substantially that he wanted to know what I would take for my interest in the contract, and I told him that it was an absurd proposition to put to me without submitting the books for an examination, and he at first did not absolutely refuse to let me see the books, but he led up to that; he stated finally that I could not see the books, that I might come and make a proposition as to what I would take for my interest—what I would sell out for. I told him point blank that I would not make any such proposition.

Q. You may explain fully just what you did do in connection with the procuring of this contract, and its execution, being as concise and collective as possible.

A. Well, we started in to find out the cost of the job, and we started in with all our ability and resources to estimate with our engineering staff, which consisted of Mr. George W. Catt, who is in charge of our office in New York, and who is a civil engineer by profession, and an experienced contractor, and also Mr. Herman Krusi, our assistant engineer and Mr. H. S. Wood, also a civil engineer, and we proceeded to estimate this job, and to gather data in the east as to the cost of other or kindred or similar jobs, one at Rochester, New York, and one in Jersey City, New Jersey.

Q. How much time was given by these gentlemen to this work, approximately?

A. All the time from early in January, 1893, to the letting of the contract, and after the letting of the contract a very large portion of their time, and my own time, until the job was well under way, at the end of July or 1st of August, 1894.

Q. Who paid these gentlemen during the time you were engaged in this work, and what were the salaries they were drawing?

(Objected to as immaterial.)

A. The San Francisco Bridge Company paid their salaries; Mr. George W. Catt was paid a salary of \$5,000 a year; and Mr. Herman Krusi was paid a salary of \$3,600.00 a year, and Mr. [6] H. S. Wood was paid a salary of \$2,100.00 a year, and my own salary was \$5,000.00 a year.

(Counsel for defendant objects to this testimony as immaterial.)

Q. How much time did these gentlemen bestow on this work at your instance, or that of the San Francisco Bridge Company, if any, after the contract had been awarded, and the execution of the work was entered upon?

(Same objection.)

A. Well, as I said before, the greater portion of their time from the date of the award to the end of August, that would be a period of about five months.

Q. How much of your own time, between the letting of the contract and the 20th of September, 1893, was devoted to the work?

(Objected to as immaterial.)

A. A large portion of my time, I cannot say exactly, but looking back over the correspondence, I find that there was almost daily something to be done in connection with this job.

Q. Have you any means of knowing whether Mr. Hoffman's time was exclusively given to this work while it was being performed or was it divided between this and other pursuits?

(Same objection.)

A. It was divided between this contract and attending to his own private contracts and business, and the administration of his own private affairs and property, which might have taken considerable of his time; he also, to my knowledge, during the pendency of this contract, went abroad to the Sandwich Islands on a pleasure trip, and he also went east with his family to the World's Columbian Exposition in Chicago in 1893, and he made a trip to Yellowstone Park; exactly what proportion of this time was devoted to this contract and what proportion was devoted to his own private contracting busi-

ness or affairs I am not advised. I know that his engineer, Mr. Bush, attended several lettings, one in particular in Tacoma, I remember, and also sent bids to California upon bridge work that was let there; but what contracts he secured, or what he did, I am not fully advised; I know that he did not abandon his own established business.

Recross-Examination.

Questions by Mr. R. MALLORY.

Q. When you came here from San Francisco to bid on the work of bringing Bull Run water to Portland, you brought with you all the data and figures that had been the basis of your bid several years before when you were the lowest bidder? A. I think I did.

Q. You had enough information then for the bid that you then put in to enable you to make the lowest bid for the work at that time?

A. Our bid at that time was the lowest bid, and we had all the data from which that bid was made, but whether I brought it to Portland with me or not I am not sure, but I rather think I did.

Q. But while you were figuring on this matter and hunting up data in San Francisco, and Mr. Hoffman was figuring and [318] hunting up data up here, you had all that data in your possession there? A. I think so; yes, sir.

Q. And from what data you had there, including that upon which that bid was based, did you not reach the conclusion in a general way as to the amount of the bid that you should put in here? A. No, I did not.

Q. You had no such conclusion?

A. I do not think I knew within a hundred thousand dollars of what bid we should put in.

Q. You swear that you did not have a bid prepared in general from aggregating about the amount you would bid when you arrived here?

A. No, sir, I did not. We had a great many tabulated statements of this work, some made by Mr. Krusi, some made by Mr. Wood, some made by Mr. Catt of New York.

Q. From all this data that you had, you had not prepared a bid in substance what you could afford to do the work for when you arrived here?

A. I had not, and it must be apparent that I had not.

Q. Had Mr. Hoffman prepared any bid in a general way indicating the amount which he proposed to offer to do the work for, on your arrival here from San Francisco?

A. No, sir, he had not. You said a bid; now you are confounding a bid with an estimate. Mr. Hoffman had tabulated estimates of quantities and prices.

Q. Well, had he not tabulated estimates of prices for which he was willing to offer to do this work at the time you arrived here from San Francisco?

A. No, sir; I think he was waiting for me to get here with my estimate of prices.

[19] Q. Had you not similar tabulated estimates which you brought with you from San Francisco for which you proposed to offer to do the work? A. No, sir.

Q. Is it not a fact that the estimates that you had prepared and for which you proposed to do the work was many thousand dollars less in amount than that prepared by Mr. Hoffman for the same work?

A. I never had any such bid prepared. The only bid that I ever prepared or ever assented to or ever contemplated putting in was the bid put in by Hoffman & Bates, and Mr. Hoffman assented to it.

Q. When he finally agreed upon a bid, you and Mr. Hoffman, was that more or less in amount than the aggregate amount of your estimates that you brought with you from San Francisco upon which you proposed to bid?

A. I did not bring any such estimates from San Francisco. I did not have any complete estimate until I got here, until we made it up jointly.

Q. Was the bid which you finally submitted for the San Francisco Bridge Company more or less in amount than the aggregate amount of the estimate which you brought with you from San Francisco, and upon which you proposed to base your bid for this work?

A. I did not bring any estimate with me from San Francisco upon which I proposed to base my bid for this work.

Q. After you had seen the estimates of Mr. Hoffman and

had compared or examined them, what recommendation did you make as to the amount of his proposed bid being reduced or increased?

[320] A. After we had been in consultation several days figuring and estimating we arrived at an estimate for a bid, and the estimate was approximately \$20,000.00 higher than the bid which we subsequently put in in the name of Hoffman and Bates, and that estimate was reduced solely at my instigation to the price which we finally did put in to the bid, and I obtained Mr. Hoffman's reluctant consent to such reduction.

Q. Yet the San Francisco Bridge Company made a bid for the same work some \$20,000.00 higher.

A. Nearer \$50,000.00.

Q. Nearly \$50,000.00 higher than the bid which was put in in the name of Hoffman & Bates, and this bid was put in by yourself for the San Francisco Bridge Company?

A. I have explained that bid; the San Francisco Bridge Company simply put in a bid for the appearance of the thing, as I was here, and the company was represented here.

Q. It was put in with Mr. Hoffman's notice and knowledge?

A. It was put in simply to keep the company before the public, as we were known to have figured on it; it did not represent anything; it was simply put in to have it high enough that it would not receive any consideration.

Q. Put in just simply that the water committee know that the San Francisco Bridge Company was a bidder?

A. Judge, I have explained that five times.

Q. Was your purpose to let the water committee know that the San Francisco Bridge Company was a bidder?

[321] A. It did not have any purpose other than the purpose which I have already indicated.

Q. Now, Mr. McMullen, you say that Mr. Catt put in nearly all his time from the 1st of January?

A. I stated early in January.

Q. From early in January for about five months afterward in connection with this business?

A. I did not say nearly all his time; I said a good portion of his time.

Q. Well, a good portion of his time?

A. That is correct.

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Q. His salary was \$5,000.00 a year?

A. That is correct.

Q. Did you ever say anything to Mr. Hoffman or give him to understand that you expected to charge the Hoffman & Bates Company here for the services of Mr. Catt?

A. I never did, sir; I considered it as my contribution to this enterprise.

Q. Mr. Krusi was getting a salary of \$3,600.00 a year; did Mr. Hoffman & Bates or Mr. Hoffman, understand that you expected to charge for his services?

A. I did not give Mr. Hoffman such an understanding nor did I charge for his services; I simply put it in as our contribution to this joint venture.

Q. Mr. Wood received a salary of \$2,100.00 a year; did you ever suggest to Mr. Hoffman that you were employing him at the expense of Hoffman & Bates and that his expenses were to be charged to this work?

A. Well, as to Mr. Wood; I offered Mr. Hoffman after we got the job Mr. Wood's assistance in the administration of the job, and he finally decided not to avail himself of his services.

Q. You are not answering my question at all.

A. No, sir, I did not then, and I do not now, unless the partnership is settled on the basis that each of the partners is to be paid for the time he contributed to it.

Q. Did you in any of the correspondence you had with Mr. Hoffman or in any conversation you had with him, tell him as a reason why you did not put up the money that he asked for that you had contributed the services of these men, and that should stand as your part of this work?

A. I never did.

Q. You never mentioned these circumstances to Mr. Hoffman in his lifetime at all, have you?

A. Mr. Hoffman was well aware—

Q. Just answer my question.

A. It was not necessary to mention that; he knew all about that.

Q. Just answer the question whether you ever have or not?

A. I never did.

Q. Did you ever mention to Mr. Hoffman in his lifetime that you expected to charge for your own services?

A. I never did.

Q. And that your services would be charged up as an item of expense against this Hoffman & Bates contract?

A. I did not, sir. I contributed that as a part of my contribution towards this joint enterprise, and I expect to be paid out of the profits, if there are any.

Q. Do you mean to have it understood from your testimony that Mr. Hoffman did not substantially devote his whole time, so far as was necessary, for the purpose of this work?

A. I mean to have it understood exactly as I said it.

[323] Q. Do you know at what time he went to the Sandwich Islands?

A. He went during the pendency of this work.

Q. You mean by pendency of this work, before the payments were finally made?

A. Before the job had finally been accepted.

Q. Before the pipe had all been laid?

A. I think it was after January, 1895.

Q. You know, do you not, Mr. McMullen, that if Mr. Hoffman went aboard, it was after the pipe had been laid?

A. During the period we were under contract to maintain it.

Q. It was during the period you were under contract to maintain it. A. Yes, I think that is it.

Q. You know that same thing is true as to his having gone to the Columbian Exposition? A. No.

Q. And is not that true as to the time he went to the Yellowstone Park?

A. I am not advised as to the date he went to Yellowstone Park, but the Chicago Exposition was held in the summer of 1893, and that was a busy time on this job.

Witness excused.

(Signed) J. McMULLEN.

Thereupon the further taking of the testimony herein is adjourned until January 15th, 1896, at ten o'clock A. M.

(Signed) GEO. A. BRODIE,
Examiner.

24] Office of G. A. Brodie, U. S. Examiner, Portland, Oregon.

January 15th, 1896, ten o'clock A. M.

At this time, pursuant to adjournment, come the parties herein, the complainant appearing by Mr. L. B. Cox, of counsel, and the defendant appearing by Mr. Rufus Mallory, of counsel, and thereupon the following proceedings were had, to-wit:

ISAAC W. SMITH is called as a witness for the complainant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q What is your occupation, Colonel?

A. Civil engineer.

Q. What connection, if any, have you with the water committee of the city of Portland?

A. I am chief engineer of the water committee and superintendent—chief engineer of construction superintendent of operation.

Q. How long have you held that position?

A. I have held that position since 1886—February, 1886.

Q. You may state whether or not the work which was done by Lee Hoffman in the name of Hoffman & Bates in the matter of bringing Bull Run water to the city of Portland for the water committee was done under your supervision.

25] A. It was done under my supervision from beginning to end.

Q. You, of course, are familiar with the original contract that was entered into by the water committee and Lee Hoffman, under the name of Hoffman & Bates, which has been offered in evidence here as "Complainant's Exhibit No. '2' "?

A. Yes, I am.

Q. I would ask you to, state what, if any, modifications were made in that contract after its execution; you may describe generally if there were any, and in what they consisted.

A. Well, as to modifications, there were no changes in the contract at all; the modifications were of this kind: in the prosecution of the work conditions arose which were not con-

templated before, entailing extra expenses on the contractors, and those bills were allowed; that was all the modifications there were.

Q. You may state whether you have in your possession any notes or other data which would serve to determine those allowances.

A. I have all of the accounts in my possession; I made up all the estimates; all the bills passed under my hands for the water committee, every dollar that went to Hoffman & Bates.

(Witness is here shown "Complainant's Exhibit No. 4.")

Q. You may state whether or not there are any items in your office in addition to the items which appear in this exhibit which serve to show allowances made or claimed by Lee Hoffman for extra work of the character you have just described.

A. There is the final estimate amounting to \$458,000.00 [326] that I sent to the water committee; that was made up by me, and I have a copy of it in the office; then there is what is called extra work, but is not extra work in the proper sense; it is extra expense; extra work is defined in a contract as work that is outside of the contract, but this was not extra work; it was extra expense—mere modifications, they might be called.

Q. Using that term, then, "extra expense," I want to know have you any account in addition to the items that appear in this exhibit?

A. Nothing in addition; all that is passed through my hands and they are absolutely as they are in my books; this is the amount paid (referring to exhibit).

Q. I am talking about matters paid or unpaid.

A. I have in my possession bills sent me by Hoffman & Bates, dated February 5, 1895; the bills are here; these are the bills (showing). This is an abstract of the bills amounting to \$19,412.73; this one is March 9th, and this one is April 6th; there was subsequently allowed a credit which reduced the amount to \$9,224.68; that is the final claim of Hoffman & Bates—the last that they have made.

Q. That, as I understand, is the claim which they have made in addition to the amounts specified in Exhibit No. 4, which have been paid? A. Yes, sir.

Q. I will ask you to state if you have had any copy made of the statement you have in your hand.

A. I have, yes. (Witness produced a copy.) These are copies of the bills.

Q. Were those prepared under your direction?

A. Under my direction.

[327] (Counsel for complainant offers in evidence the documents produced by the witness, and it is agreed between counsel that the papers produced by the witness are copies of the original documents in his possession as engineer and superintendent of the water committee, one statement being dated February 6, 1895, showing accounts aggregating \$19,412.73, which is received and filed, marked "Complainant's Exhibit No. 5." One statement dated March 9, 1895, carrying forward this credit, with divers charges and credits, showing a balance of \$19,252.18, which document is received and filed, marked "Complainant's Exhibit No. 6." One statement, dated April 1, 1895, carrying forward his last balance with a credit of \$27.50, showing a net balance of \$19,224.68, which statement is received and filed, marked "Complainant's Exhibit No. 7.")

Q. I will ask you to state what, if any, action the water committee has taken in regard to the claim made by Hoffman as represented in the exhibit just offered in evidence.

A. This is the action of the water committee; I have a copy of a letter which I wrote Hoffman & Bates stating the action of the water committee.

Q. What I want to get at is whether the water committee have allowed these amounts.

A. I stated the balance as per my statement, \$19,224.68; total amount allowed by the water committee was \$2,263.43, and the total rejected \$16,961.25.

Q. The allowance was \$2,263.43 out of a claim of \$19,224.68 and rejected \$16,961.25?

A. Yes, sir.

Q. You may state whether or not that is the way the matter stands at the present time.

[328] A. That is the way the matter stands at the present time.

Q. Then, do I understand that the amount owing from the water committee to Hoffman on account of this contract is the ten per cent reserve on the amount of the principal contract, together with \$2,263.43?

A. Yes.

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. Do I understand you that \$2,263.43 has been paid, or has not been paid? A. Has not been paid.

Q. There has been no settlement reached between the water committee and Hoffman & Bates as to this claim?

A. No settlement yet.

Q. There remains unsettled between the committee and Hoffman & Bates the amount of \$16,961.25 claimed by Mr. Hoffman as due to him?

A. Yes, claimed by Mr. Hoffman as due him.

Q. The 10 per cent reserve according to the contract still remains in the hands of the water committee?

A. Yes, sir.

Q. The 10 per cent reserve itself does not include the 10 per cent upon \$2,263.43?

A. No, it does not include the ten per cent on the extra compensation; only 10 per cent on the estimate that I made on the regular contract.

Q. I understand, then, that you claim that the work which Hoffman claims to have been extra work was not extra work at all?

[829] A. It was a modification of the contract—not extra work; the work states specifically the difference between modifications and extra work.

Redirect-Examination.

Questions by Mr. L. B. COX:

Q. I will ask you to state whether or not this amount of \$2,263.43 which has been allowed by the water committee was for work done in connection with bringing Bull Run water to Portland? A. It was.

Witness excused.

ISAAC W. SMITH is recalled as a witness for the defendant, by consent of counsel.

Direct Examination.

Questions by Mr. R. MALLORY:

Q. Mr. Smith, what had you, if anything, to do with the letting of bids for building the waterworks from Bull Run to Portland?

(Counsel for complainant objects to the question, and by agreement of counsel now enters a general objection to all evidence to be introduced on behalf of the defendant as to any matters which transpired in connection with the work under [330] consideration prior to the execution of "Complainant's Exhibit No. 1," on the ground that the same are immaterial.)

A. I prepared the specifications and advertised in the paper that bids would be taken on a certain day; prepared the blank form for the bid on which each person was to make his bid, by order of the water committee, of course.

Q. What, if anything, did you do with the bids when they were received?

A. The bids were referred to me by the water committee for tabulation and report. I tabulated the bids, giving the amount of each bid that each party submitted.

Q. By whom was the bids opened and to whom were they addressed?

A. The bids were opened in the presence of the water committee; the bids were opened by one of the members of the water committee or the clerk—I don't know which—and read.

Q. I will ask you if you prepared a tabulated statement of the bids. A. I did.

Q. Have you that statement here, or a copy of it?

A. I have a printed copy of the tabulation.

Q. Will you produce it, please?

A. This is the tabulation for the manufacture and laying. (Witness produces printed document.) I have the bids themselves.

Q. You have the bids themselves?

A. Yes, I have the bids here.

Q. I will ask you to state whether a bid was submitted by Hoffman & Bates, and if you have the bid with you.

A. Yes, I have the bid with me.

Q. Will you produce that bid, please?

[331] A. These are the bids; they are all here. Here is the bid of Hoffman & Bates (showing).

(Witness produces a paper dated Portland, Oregon, March 1, 1893, addressed to Frank T. Dodge, clerk of the water committee of the city of Portland, and signed Hoffman & Bates, by Lee Hoffman.)

Q. I will ask you to state whether or not this bid was sub-

mitted by Hoffman & Bates to do the work described in this paper? A. It was.

(Counsel for defendant offers in evidence the paper produced by the witness; counsel for complainant objects to the introduction of the same in evidence as well, as to all other exhibits relating to anything which may have transpired prior to the execution of "Complainant's Exhibit No. 1," on the ground as above stated to the interrogatories which were or which may be propounded to the witness relating to the same time, and by consent of counsel for defendant a general objection is allowed to be taken to all such evidence; the document referred to is received and filed, marked "Defendant's Exhibit 'S2,'" G. A. B., Ex., and by agreement of counsel it is stipulated that a copy thereof may be made by the examiner and substituted in lieu of the original.)

Q. I will ask you whether or not any certified check accompanied this bid of Hoffman & Bates.

A. There was. It is stated in the bid what the amount of it was.

Q. I will ask you if the check referred to here was furnished at the time the bid was filed.

A. It was furnished with that bid as he states.

[332] Q. I call the attention of the witness to a paper dated San Francisco, California, March 1, 1893, addressed to Frank T. Dodge, clerk of the water committee of the city of Portland, Oregon, and signed San Francisco Bridge Company, by John McMullen, President, and I will ask you to state what that paper is.

A. That is the bid of the San Francisco Bridge Company for performing the same work that Mr. Hoffman proposed to perform.

Q. It is a bid for the work described in the paper itself?

A. Yes, in the paper itself—the same work and the same items in both papers.

(Counsel for defendant offers in evidence the paper last shown the witness; same objection; paper referred to is received and filed, marked "Defendant's Exhibit T2"; same stipulation as to copy to be substituted in lieu of the original.)

Q. This paper refers to a certified check for \$27,300.00. I will ask you to state whether such a check accompanied this bid.

A. It did accompany the bid.

Q. I will ask you to state whether these bids were opened at the same time at the same meeting of the committee.

A. They were all opened at the same time—same day.

Q. To whom was the bid finally awarded?

A. The bid was awarded to Hoffman & Bates.

Q. I will ask you to state whether this same work for building the system of waterworks from Bull Run to Portland was offered at any time prior to this letting on the 1st of March?

(Same objection, and as immaterial and irrelevant.)

333] A. Not the same work; the construction of work from Bull Run to Portland was offered and the bids were taken, but it was not the same work; it was for bringing Bull Run water to Portland, but it was for much less quantity of water. Six million gallons a day was only estimated to bring in then, a much smaller quantity than now.

Q. I will ask you whether the San Francisco Bridge Company was a bidder upon that work.

(Same objection.)

A. I am not positive whether it was the San Francisco Bridge Company or Mr. McMullen himself, but it was one or the other.

Q. Either the San Francisco Bridge Company or Mr. McMullen? A. Yes, sir.

Q. Were there other bids for that work besides Mr. McMullen or the San Francisco Bridge Company?

A. Yes, sir.

Q. Do you remember, and can you state now, who was the lowest bidder for that work?

A. I think Mr. McMullen was the lowest bidder; there were several works—making of roads, etc.—but on the principal item my recollection is that Mr. McMullen was the lowest bidder.

Q. The contract was not awarded, was it?

A. The contract was not awarded.

Q. The city did not succeed in selling its bonds?

A. No, sir; they could not sell the bonds; the governor vetoed the bill for selling bonds.

Q. The bids of Hoffman & Bates and the San Francisco Bridge Company, by John McMullen, to which your attention has been called, did they or not include the pipe from Mt. Tabor

to Portland, and the submerged pipe across the Willamette River?

[334] A. They did not in that bid for manufacturing and laying.

Q. They were not included in that bid?

A. No.

Q. I will ask you if the work of manufacturing and laying the submerged pipe was offered in a separate bid.

(Objected to on the ground that it is immaterial and irrelevant.)

A. The work of manufacture and laying was a separate bid, and did not include anything except manufacture and laying.

Q. What was the bid, if any, with regard to bringing water across the Willamette River; what was the nature of that bid?

(Same objection.)

A. Well, we had separate bids for the submerged pipe; they were opened on the same day, and that was a separate bid from the other; these bids I have here.

Q. I will ask you to state whether Mr. McMullen or the San Francisco Bridge Company, by him, bid for the work of the submerged pipe.

(Same objection.)

A. They did.

Q. I will ask you if Hoffman & Bates bid for that work.

(Same objection.)

A. They did not bid for that work.

Q. State whether or not the work of laying the submerged pipe was let in pursuance of the bid received on that day.

(Same objection.)

[335] A. It was not. There was no contract awarded on that day.

Q. Were advertisements made for bids later for the same work.

(Same objection.)

A. Yes, for the same work.

Q. What was the date of the second letting of the submerged pipe?

(Counsel for complainant, by agreement of defendant's counsel, here enters a general objection to any bid upon or contract for any other work than that for manufacture and laying of steel pipe and other incidentals pertaining thereto, which is in controversy in this suit, and the time such other distinct part

of the work may have been let or contract therefor entered into, on the ground that the same is irrelevant and immaterial.

A. The second letting was August 15, 1893.

Q. Was the San Francisco Bridge Company or Mr. McMullen or the San Francisco Bridge Company, by Mr. McMullen, a bidder at that letting?

A. They were not.

Q. Was Hoffman & Bates a bidder?

A. Hoffman & Bates bid.

Q. To whom was that contract awarded?

A. That was awarded to the Oregon Bridge Company.

Q. It was not awarded to Hoffman & Bates?

A. It was not awarded to Hoffman & Bates.

Q. Have you any data by which you can tell by whom the bid of Hoffman & Bates was submitted—that is, the person who submitted it—have you any means of knowing?

[336] A. Well, the bids were submitted by letter in a sealed envelope. There was no party that knew what they contained. They were all opened at the same time.

Q. Had you any knowledge or information at the time the bids were received on the first of March, 1893, of any agreement between Hoffman & Bates and McMullen as to their interest in the bid?

A. I had no knowledge whatever.

Q. Had you any information or any means of knowing that the bid of the San Francisco Bridge Co. by John McMullen was put in for any other purpose than in good faith?

A. I had no means of knowing that. I had no knowledge whatever beyond the written bid which was submitted to the committee. I had no conversation or understanding with any contractor.

Q. How was that bid regarded by the committee as to other bids that were presented there being presented in good faith?

A. They were all accepted as presented in good faith. No exception was made to any bid at all, and the contract was let to the lowest bidder.

Q. It was understood to be so presented by the bidders?

A. It was understood to be.

Q. So far as the committee was concerned?

A. As far as my knowledge goes it was.

Cross-Examination.

Questions by Mr. L. B. COX:

[337]

Mr. COX.—Subject to the ruling of the Court upon the objections to the direct interrogatories counsel for complainant now propounds the following questions to the witness:

Q. Is it not a fact, Colonel, that before these bids were opened or considered that you had made full estimates in regard to all of the work for which bids were submitted, so as to determine the reasonable cost of doing the same?

A. I did make that estimate.

Q. It is a fact, is it not, that this estimate had been submitted to the committee, and was before the committee at the time these bids were opened?

A. My estimates had been submitted to the committee; I do not know whether they were before the committee at that time.

Q. How long prior to this time had they been submitted?

A. Well, I suppose my last estimate was probably about three months before the letting of the bids.

Q. Is it not a fact that the committee made comparison between the bids offered and your estimates before letting the contract?

A. I do not know what they did; I cannot say that they made any comparison.

Q. You were not present and do not know personally?

[338] **A.** I was not present. I have no knowledge of any comparison made.

Q. Did you not advise the committee from time to time as its engineer in regard to the cost of doing this work, prior to the time these bids were opened and the contracts let?

A. How do you mean, during the progress of the work or prior?

Q. Prior to the time the bids were opened.

A. Yes; I made a great many estimates from 1886 to 1893, and while the work was going on I made a great many estimates for them; I do not remember the dates. I estimated the cost and made a full report.

Q. That had all been submitted to the committee before the bids were opened.

A. It had all been submitted to the committee before the bids were opened.

Q. Did not the committee in the matter of those bids reserve the right to reject any and all bids?

A. They did.

Q. And without the necessity of assigning any reason therefor?

A. That is the fact; they reserved the right.

Q. How many bids altogether were offered on the manufacturing and laying of the steel pipe?

A. There were eight bids.

Q. Please give the names of the respective bidders and the amount bid by each.

A. The Risdon Iron & Locomotive Works, \$600,737; the Bullon Bridge Co., \$533,507; Oscar Huber, \$521,775.40; San Francisco Bridge Co., \$514,664; Wolff, Buener & Zwicker, \$495,682; Ferry Hinckle & Robert Wakefield, \$481,040; E. W. Jones & O. W. Wagner, \$477,552.00; Hoffman & Bates, \$465,667.00

Q. These bids were all before the committee and taken under consideration at the time of the award to Hoffman & Bates was made, were they not?

A. They were all opened on the same day at the same time.

Q. And all given consideration?

A. All given consideration, yes.

Q. How did the estimate which you had made on the work of manufacturing and laying the steel pipe compare with the bid put in by the San Francisco Bridge Co. for that work?

A. I think that my estimate was larger than the estimate of the San Francisco Bridge Co. I estimated a larger price for the iron.

Q. Your aggregate estimate was larger than the bid which the San Francisco Bridge Company put in?

A. Yes, sir.

Witness excused.

P. L. WILLIS is called as a witness for the complainant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation? A. Lawyer.

[340] Q. What, if anything, have you had to do with the estate of Lee Hoffman deceased?

A. I have attended to some business for Mrs. Hoffman.

Q. She is the executrix of the will?

A. She is the executrix of the will of Lee Hoffman, deceased.

Q. I will ask you if you have in your possession the books belonging to the state showing entries pertaining to the work done by Lee Hoffman in manufacturing and laying steel pipe and other matters connected therewith in bringing Bull Run water to the city of Portland under a contract made by the city of Portland, acting through its water committee, dated March 10th, 1893.

A. I cannot answer about the date of the contract. I have a number of books, and so far as I know about the books they relate to the contract between Hoffman and the city.

Q. You are familiar with the books relating to that work?

A. Yes.

Q. I will ask you to state, Mr. Willis, whether or not you have two certain cash books relating to this transaction?

A. I have two cash books.

Q. Will you produce them, please?

(Witness produces the books.)

Q. I understand that those are cash books kept by Hoffman in connection with the work under consideration?

A. I understand that to be the fact, though I have no knowledge on the subject, except in a general way.

[341] Q. They purport to be such books? A. Yes.

Mr. MALLORY.—I make an objection that the books are not sufficiently proven.

(Counsel for complainant offers in evidence the two books produced by the witness, and the same are received and filed, marked "Complainant's Exhibit No. 8." and "Complainant's Exhibit No. 9.")

Q. I will ask you if you have a book known as an "Extra-Work Book?"

A. I have a book which appears to contain an account of an extra or force book. (Witness produces the book referred to.)

(Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 10.")

Q. Have you a journal?

A. I have. (Witness produces the book referred to.)

(Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 11.")

Q. Have you a ledger?

A. I have. (Witness produces a ledger.)

(Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 12.")

Q. Have you an index to this ledger?

A. Yes. (Witness produced the index.)

12] (Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 13.")

Q. Have you the book kept as a trial balance?

A. I have a book of trial balances.

(Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 14." Counsel for the defendant object to Exhibits No. 8 to 14, inclusive, for the reason that they are immaterial and irrelevant. Subject to the above objection, it is stipulated between counsel for complainant and defendant that the entries in the books may be taken as evidencing the facts in regard to the transactions of which they purport to speak. That either party may have leave to refer to the same upon the trial and argument of the case without any objection as to the manner of their proof.)

Q. I will ask you to state, Mr. Willis, if you have a certain paper known as voucher No. 514, bearing date the 10th day of January, 1894.

A. I have a paper designated as voucher 514 purporting to have been paid January 10, 1894.

Q. I will ask you if you were acquainted during his lifetime with the handwriting of Lee Hoffman, deceased.

A. I have seen Mr. Hoffman write frequently.

Q. You would recognize his handwriting from that fact?

A. Well, that is a difficult question to answer; I have seen so much testimony on that subject, that I am slow to answer that I would know his handwriting.

Q. Do you know his signature?

[343] A. Well, I cannot say absolutely that I know his signature. I have seen Mr. Hoffman write frequently, and if I should see writing I could tell whether it looked like his. I would have an opinion as to whether it was or not.

Q. I will ask you to state what your opinion is as to the signature appended to the voucher being the genuine signature of Lee Hoffman.

A. I should accept as his genuine signature. I believe it is.

Q. There is a paper pasted on the face of the voucher on which there is some writing; I will ask you to state if you know in whose handwriting that is.

A. I cannot say that I know, yet I believe that it is Mr. Hoffman's handwriting.

(Counsel for complainant offers in evidence the paper last shown the witness. Defendant objects on the ground that it is immaterial and irrelevant and not shown to have any connection with this case. The paper referred to is received and filed, marked "Complainant's Exhibit No. 15," G. A. B., Ex.)

Q. I will ask you to state if you have in your possession voucher No. 1,009, dated October 12, 1894.

A. I have a paper which I understand is voucher 1,009, and purports to have been paid on the 12th of October, 1894. (Witness produces the paper referred to.)

Q. I will ask you to state whose signature is that appended to the voucher, if you know.

A. I cannot state that I know, but my opinion is that it is Mr. Hoffman's signature.

Q. Lee Hoffman's? A. Yes, sir.

[344] (Counsel for complainant offers in evidence the paper last produced by the witness. Objected to as immaterial and irrelevant. The paper referred to is received and filed, marked "Complainant's Exhibit No. 16," G. A. B., Ex.)

Q. I will ask you if you have in your possession voucher No. 947?

A. I have, as I understand, voucher No. 947. (Witness produces a paper.)

(Counsel for complainant asks that the paper last produced by the witness be marked for identification by the examiner, and the paper is marked "For Identification No. 1, Jan. 15th, 1896," G. A. B., Ex.)

Q. I will ask if you have in your possession voucher No. 1,027.

A. I have what I understand to be voucher No. 1,027. (Witness produces a paper.)

(Counsel for complainant asks to have the paper last produced by the witness marked for identification by the examiner, and the paper is marked "For Identification No. 2. Jan. 15th, 1896." G. A. B., Ex.)

Q. Have you in your possession voucher No. 1,176?

A. I have what I understand to be voucher 1,176. (Witness produces a paper.)

Q. Whose signature is that appended to the bottom of the exterior of the paper?

A. I should think that was Mr. Hoffman's signature.

(Counsel for complainant offers in evidence the paper last produced by the witness. Objected to as incompetent and immaterial. The paper referred to is received and filed, marked "Complainant's Exhibit No. 17." G. A. B., Ex.)

Q. Have you voucher No. 1,197?

45] A. Yes, I have what I understand to be voucher No. 1,197. (Witness produces a paper.)

(Counsel for complainant offers in evidence the paper last produced by the witness. Objected to as incompetent and immaterial. The paper referred to is received and filed, marked "Complainant's Exhibit No. 18," G. A. B., Ex. The defendant also objects to the admission of the paper as irrelevant.)

Q. A subpoena was served upon you asking that you produce the following papers: Checks No. 1,256, 2,280, 2,482, 2,515, 2,560, and a check drawn the 5th day of August, 1895 by Julia E. Hoffman executrix, for \$13,882.66, and a certificate of deposit on the banking-house of Ladd & Tilton for \$40,000.00, dated June 17, 1895, all of said checks having been drawn on the same institution; I will ask you to state if you have those papers.

A. I have never, to my knowledge, seen any of those papers. If any of them are in my possession I have no knowledge of it.

Q. Did you make search for them?

(Objected to as immaterial and irrelevant.)

A. I did.

Q. Have you similar papers, those in company with which these would be expected to be found?

(Same objection.)

A. I can scarcely answer that question except to say that I have in my possession some checks drawn by Hoffman & Bates on Ladd & Tilton that appear to have been returned on settlement with the bank.

Q. Relating to this same matter--this Bull Run contract?

[346] A. I understand they do.

Q. Did you search where you would expect to find these papers that you were unable to find?

(Same objection.)

A. I did, yes. That certificate, I can state, has never been in my possession, because it is too valuable a paper to have been tossed about without attention. If anything of that kind had been delivered to me I would have understood it and taken care of it. But canceled checks may be there with other papers in my possession, but I have looked with as much care as I could after receiving the subpoena and I did not find any.

Q. I will ask you to state, Mr. Willis, if you know who were the sureties on the bond that was given by Hoffman to the city of Portland on this Bull Run contract for manufacturing and laying steel pipe?

(Objected to as immaterial.)

A. My impression is that I was on his bond. I have been on several bonds for Mr. Hoffman, and I am not certain but this was one.

(It is agreed that P. L. Willis and G. W. Bates were the sureties upon the bond in question.)

Q. What is the fact as to your having been the legal adviser of both Hoffman and the San Francisco Bridge Company prior to the execution of this bond?

(Objected to as immaterial.)

A. I did attend to some business for both Hoffman and McMullen.

Q. Who was Bates; what was his relations or what had they been with Hoffman?

(Same objection.)

[347] A. Bates at one time was a partner in the firm of Hoffman and Bates, several years ago. At the time of the execution of that bond I do not know of any intimate business relation between them.

Q. You mean he was a partner with Lee Hoffman?

A. He had been.
No cross-examination.
Witness excused.

Thereupon the taking of testimony herein is adjourned until to-morrow morning, January 16th, 1896, at 9:30 o'clock.

[Signed]

GEO. A. BRODIE,

Examiner.

Office of G. A. Brodie, Examiner.

Portland, Oregon, Jan. 16th, 1896, 9:30 A. M.

At this time, pursuant to adjournment, appear the parties herein as before, and thereupon the following proceedings are had to-wit:

A. DONNELL is called as witness for the complainant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. Were you acquainted with Lee Hoffman in his lifetime?

A. I was.

[348] Q. Were you ever in his employ?

A. Yes, sir.

Q. Do you know anything about the work done by Hoffman in the manufacture and laying of steel pipe and other work connected therewith under a contract with the water committee of the city of Portland for the bringing of Bull Run water to the city?

A. Yes, sir.

Q. You may state whether or not you were in his employ during that time.

A. I was.

Q. In what capacity?

A. During that time I was employed as purchasing agent and paymaster.

Q. Were you in the office?

A. Yes, sir, a portion of the time.

Q. Who kept the books during that time?

A. Mr. E. M. Arthur.

Q. Were you familiar with them?

A. Yes, sir.

Q. Witness is shown "Complainant's Exhibit No. 15." In whose handwriting are the words in writing first found on this

exhibit, "Portland, Or., Jan. 1, 1894, Lee Hoffman, for salary from May 1st, 1893, to Jan. 1, 1894, as per bill attached 8 months at \$1,000.00 per month, \$8,000.00," and the words at the conclusion of the voucher, "Jan. 10th, 1894. \$8,000.00."

(Objected to as immaterial.)

A. Do you wish me to state in whose handwriting that is?

Q. Yes. A. That is mine.

[349] Q. In what capacity or for what purpose did you prepare the writing?

(Objected to as immaterial.)

A. Well, I suppose as manager of the office.

Q. Manager in what capacity; what were your functions as manager?

A. Well, in charge of the office matters; such as looking over the books, making vouchers, pay-rolls, taking receipts and such matters—general office work.

Q. Well, now, I will ask you to what work this voucher related?

(Objected to as immaterial.)

A. Well, I do not know any further than what the bill attached called for. The bill states what it was for, I think.

Q. To what account was it charged?

(Objected to as immaterial.)

A. I think it was charged to incidental account, as we had no other account that would cover that without making an extra account.

Q. What, the incidental account of Hoffman's general work, or the incidental account against any particular account?

A. Incidental account Bull Run pipe line work.

Q. What do you mean by that; do you mean Bull Run pipe work?

(Objected to as incompetent; the books are the best evidence, and the books are in evidence.)

A. I mean the work for which the books were kept that this voucher is charged in.

[350] Q. Well, do you mean by that the work which was being done by Mr. Hoffman to bring Bull Run water to Portland?

(Question objected to as incompetent and leading.)

A. Yes, the work that was done under that contract.

Q. Now, I will ask you to look at the book "Complainant's

Exhibit No. 12," and Exhibit No. 11 and state if you recognize them, and if so as to what work have they application.

(Objected to as immaterial.)

A. I recognize the books to be the journal and ledger kept for the portion of the Bull Run pipe line work which Mr. Hoffman contracted for.

Q. You may state whether or not they were kept under your direction.

A. A portion of the time they were; not all the time. They were kept with my assistance all the time, but I did not have full charge of office matters during the whole continuance of the work.

351] Q. I will ask you if you can find any entries in the book corresponding with "Complainant's Exhibit No. 15," which has been submitted to you.

A. Do you mean showing the entry of this voucher?

Q. Yes, if there is any. Is there an entry in the books?

A. Yes, sir.

Q. Will you find it, please?

A. Well, the original entry itself is in one of the auxiliary books.

Q. Which one?

A. It is the distribution of vouchers book. It is not here.

Q. I will ask you to look at the ledger and see if you can find an entry corresponding with this voucher.

A. I cannot find an entry in the ledger showing that voucher separately. It was charged to incidental account on the distribution book, and the total of the charge to incidental account would be footed up at the end of the month and be entered in the journal, and then posted to the ledger.

Q. The witness is shown "Complainant's Exhibit No. 16," and is asked in whose handwriting the pen and ink words and figures, "Portland, Or., Oct. 12-4 (1894)," on the face of the exhibit are?

(Objected to as immaterial.)

A. You mean the words "Portland," the abbreviation for Oregon, and the abbreviation for October, and the 12 and 4 is in whose handwriting?

Q. Yes.

A. That is my own handwriting.

Q. Whose signature is that on the back?

A. Which one do you have reference to?

Q. The first one. A. My own.

Q. You may state whether that paper was prepared under our direction.

(Same objection.)

A. It was prepared by me, not under my direction.

Q. It was prepared by you?

A. Yes, sir.

Q. To what work does it relate?

(Same objection.)

A. It relates to the work to which it is charged as shown on the voucher.

Q. Well, what is that?

[352] (Same objection.)

A. Incidental account of Lee Hoffman against the Bull Run pipe line.

Q. The work that you have been talking about?

(Same objection.)

A. Yes, the same work.

Q. Witness is shown "Complainant's Exhibit No. 17"; in whose handwriting is all the pen and ink writing on the face of the voucher and all that on the back, except the name Lee Hoffman and the examiner's notations?

(Objected to as immaterial and incompetent.)

A. That is my own.

Q. To what work did the matter covered by this voucher relate?

(Same objection.)

A. The same work as charged in the previous vouchers.

Q. The witness is shown "Complainant's Exhibit No. 18"; in whose handwriting is all the matter which appears upon the face of the document and all which appears upon its back being in pen and ink, except the name Lee Hoffman and the examiner's notation?

(Same objection.)

A. My own.

Q. To what work did the matters covered by this paper relate?

(Same objection.)

A. I do not know as it covered any particular work.

Q. Well, to what matter did it relate?

[353] A. Well, it related to the transactions indicated at that time.

Q. In what connection?

(Same objection.)

A. Well, in connection with the funds here; the amount on hand at that time.

Q. What funds?

(Same objection.)

A. The funds to the credit of this particular work —the Bull Run pipe line.

Q. On the face of this voucher there is this written matter; "Advanced to be deposited with Ladd & Tilton for three months, on 3 per cent interest bearing certificate, \$60,000.00" I wish you would explain the significance of that entry.

(Objected to as immaterial.)

A. It means this; of course you understand we used in keeping this, the voucher system, and every transaction that was made usually went through the vouchers, and for this particular transaction there was a check drawn for \$60,000 and handed to Mr. Hoffman, which he presented to the bank and asked for a certificate of deposit for three months, and being as he was the one that drew the check, it was drawn in his name, and charged to him in this manner, by the making of the voucher, according to the method of keeping the books.

Q. Then do we understand that the effect of that was to draw \$60,000 from the general account of the works that we have been talking about, and to change it from a deposit to a general account to a special account on certificate of deposit?

(Same objection.)

A. It was simply to put the money on interest.

Q. And change the character of the deposit?

[354] (Same objection.)

A. Well, the money was lying in an open account at the bank, and it changed the character of it to interest bearing; that is what it was done for.

Q. On each one of the Exhibits 15, 16, 17, and 18, there appears the name "Lee Hoffman"; I will ask you to state if you are acquainted with the signature of Lee Hoffman, and if you were at the time these transactions took place?

A. Yes, sir.

Q. And how did you come to know it?

A. Well, by seeing him frequently sign it, and seeing it frequently.

Q. I will ask you to look at this signature, and state in whose handwriting it is, if you know, on each of said exhibits.

A. You mean the name of Lee Hoffman?

Q. Yes.

A. They are in his own handwriting at the foot of these four vouchers.

Q. The witness is shown a paper which has been marked "For identification No. 1"; in whose handwriting is all the matter which appears on the face of this paper, except the slip which is pasted on the face and except the word "Hugh Foy"? I mean the pen and ink matter.

(Objected to as immaterial.)

A. Mine.

[355] Q. To what work did the matters set forth in this paper relate?

(Same objection.)

A. Bull Run pipe line work.

Q. I wish you would explain what the significance of that paper is.

(Objected to on the ground that the paper speaks for itself.)

A. This particular paper is for the first estimate under contract, dated December 7th, 1893, for work done on the Bull Run pipe line as per certificate of engineer attached; that is what it is for.

Q. By whom was that work done?

(Objected to as immaterial.)

A. Well, in fact I do not exactly know; it was done by Italians, dagoes and others.

Q. You misapprehend my question; what connection did Foy have to that work under consideration?

(Objected to as immaterial.)

A. He was a subcontractor.

Q. Now, then explain in connection with Foy's relation to the work what that paper means.

(Same objection that the paper shows for itself, and is immaterial.)

A. It means that this was a subcontract; Hugh Foy's first estimate of work done on the Bull Run pipe line.

Q. Are you acquainted with the signature of Foy?

A. Yes, sir.

Q. Can you say whether or not that is his signature appended to the bottom of that document?

A. Yes, sir, that is his signature.

Q. It purports to be a receipt by him of the amount of money specified on the face of the paper, does it not?

(Same objection, and it is understood that all this evidence [356] is received subject to the same objection.)

A. Yes, sir.

Q. Was the matter specified in that voucher carried into the books?

A. The amounts and figures, yes, sir.

Q. To what account?

A. It was charged to the account as shown on the voucher, "Hugh Foy, Subcontractor."

Q. As an expense in connection with the execution of the work? A. As a payment on his account.

(Counsel for complainant offers in evidence the paper last shown the witness, and the same is received and filed, marked "Complainant's Exhibit No. 19." G. A. B., Ex.)

Q. The witness is shown a paper marked "For identification No. 2"; in whose handwriting is the pen and ink matter on the face of the voucher, except the signature of "Hugh Foy"?

(Same objection.)

A. It is mine.

Q. Whose signature is that appended at the foot of it?

A. That is Hugh Foy's.

Q. What is the character of the transaction?

(Objected to on the ground that the paper speaks for itself.)

A. It shows the final estimate under contract for work on the Bull Run pipe line.

Q. State if that relates to the same matter as the last exhibit?

A. Yes, it relates to the same matter as the last.

(Counsel for complainant offers in evidence the paper last shown the witness, and the same is received and filed, marked [357] "Complainant's Exhibit No. 20." G. A. B., Ex.)

Q. I now show you a book marked on its back "Bull Run Pipe Line, Hoffman & Bates, Distribution Book—Bills," and I will ask you if you are familiar with it.

A. Yes, sir.

Q. What book is it?

(Counsel for defendant objects to the question on the ground that the book speaks for itself.)

A. It what we called the distribution book.

Q. Is that the book to which you referred in your testimony a while ago? A. Yes.

Q. Was that book kept by you or under your direction?
(Same objection.)

A. At times it was kept by me and at other times under my direction.

(Counsel for complainant offers in evidence the book last shown the witness. Objected to by defendant as immaterial. The book referred to is received and filed, marked "Complainant's Exhibit No. 21." G. A. B., Ex.)

Q. Will you now state if you can find entries in that book just offered in evidence of the matter specified in this Exhibit No. 15?

(Objected to as immaterial.)

A. You mean can I show you where that voucher is entered in this book.

Q. Yes. A. Yes, sir, on page 38.

Q. To what books was that carried?

(Objected to as immaterial.)

[358] A. Well, that entry by itself was not carried. It was carried in the aggregate amount taken from this book at the end of the month to the journal.

Q. Will you find the entry in the journal?

A. Here it is on page 34. Incidental account \$8,095.75; the last entry.

Q. You mean the last group of entries?

A. The last entry. It is all considered as one entry.

Q. In common parlance the entry would be a group of entries?

A. Well, speaking in bookkeeping parlance we call it one entry, no matter how long the charges are.

Q. You may state whether or not that entry was carried to any other book.

(Objected to as immaterial.)

A. Yes, sir.

Q. To what book? A. To the ledger.

Q. Will you find it in the ledger, please?

A. Here it is on page 26, 9th line from the bottom.

Q. I wish you would state if you can find any entry, the original entry corresponding to the matters embraced in Exhibit No. 16.

(Same objection.)

A. Yes, I can; it is entered in the same manner; it is entered on page 80 of the distribution book.

Q. To what book was it carried, if any?

A. It was carried in the same manner as shown by the previous voucher, to the journal.

Q. Identify the page.

A. Page 63 of the journal.

Q. It is included in what entry?

[359] A. The amount is divided into two charges; \$12,000 of that amount appears in incidental account on page 63 of the journal, the amount in the journal being \$12,079.76, and the balance of the amount appears on the journal on the same page, 63, being \$15,653.30.

Q. Will you now trace that to the ledger as it appears there?

A. The first amount which is charged to incidental we find on ledger, page 27, \$12,079.76. The second amount is found posted on page 51 of the ledger, being \$15,653.30.

Q. The amount you have last mentioned in the original entry on the voucher consists simply of the name of Lee Hoffman, and in the ledger it stands as you have identified it, "Audited Vouchers," what does that account cover, if you know?

A. It covers various credits which had been made to this account during the progress of the work, up to that date.

Q. Credits of what nature?

A. Well, cash advances, tools, and expenditures, and such as that.

Q. I will ask you to state, if you can find, the original entry of the matters specified in Exhibit No. 17, voucher 1176.

A. The first entry of voucher 1176 appears in the distribution book, page 94, amount \$8,855.04.

Q. It stands there as simply Lee Hoffman; what does it cover.

A. It appears here as charged to Lee Hoffman, as that amount having been received. That entry was carried to the

[360] journal and is found on page 73; it is included in the amount here \$68,855.04.

Q. Do you find the ledger entry?

A. It is posted to the ledger on page 51, being the last debit charge.

Q. Then it is included in another one?

A. I stated that the original amount was included in this amount, in the journal, and that amount is posted to the ledger.

Q. The aggregate amount?

A. The aggregate amount.

Q. What is the amount in the ledger?

A. \$68,855.04.

Q. The witness is shown Exhibit No. 18. Can you find the original entry of the matters specified on the face of that voucher, number 1197?

A. Yes, sir.

Q. Where does it appear?

A. It appears on page 94 of the distribution book. It is included in the same amount that I just mentioned, in journal, page 73, and it is carried in the same amount to page 51 in the ledger.

Cross-Examination.

Questions by Mr. R. MAILLORY:

Q. How long were you in the employ of Mr. Hoffman?

A. About three years and five months.

Q. During any portion of that time were you his confidential clerk?

A. Well, I never heard him call me such.

[361] Q. Were you entrusted by him with authority to sign checks for him?

A. Yes, sir.

Q. You were entrusted with that authority?

A. I was entrusted with authority to sign checks.

Q. You had complete information from him in regard to this business.

A. Well, I do not know; I did on any subject that he wished me to take up and handle; I do not know that I had complete information about all matters pertaining to this work.

Q. In all matters that you were called upon to act for him you were informed by him?

A. I think so.

Q. And had his entire confidence as far as you know?

A. As far as I know, yes, sir.

Q. How long, if at all, after his death did you remain in the employ of Mr. Hoffman?

A. From the time of his death until the first of November.

Q. Did you say the first or 21st—

A. Well, I finished up and turned over matters about the 18th of October, but I assisted until the 1st of November.

Q. Since that time you have not been in his employ?

A. No, sir.

Q. What is your present business?

A. I have none.

Q. Have you any employment at this time.

A. No, sir; none whatever.

Q. Are you in the employ of Mr. McMullen?

A. I am not.

Q. Are you receiving any pay from him in any way?

62] A. No, sir.

Q. Have you any agreement whatever of pay from him?

A. No, sir.

Q. No compensation of any sort from him?

A. No, sir.

Q. Have not had any such arrangement from him?

A. No, sir.

Witness excused.

Thereupon the taking of testimony herein is adjourned until January 22, 1896, at ten o'clock, A. M.

[Signed]

GEO. A. BRODIE,

Examiner.

Office of G. A. Brodie, Examiner, Portland, Oregon.

January 22, 1896, ten o'clock A. M.

At this time appear the parties herein, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

Mr. JOHN McMULLEN, complainant, is recalled in his own behalf.

Direct Examination.

Questions by Mr. L. B. COX:

Q. I show you a letter, dated Portland, Oregon, March 16,

[363] 1893, addressed to J. McMullen, San Francisco, and I will ask you whose signature is appended to that letter.

A. That is Mr. Hoffman's signature.

Q. You may state whether this letter was received by you in the ordinary course of business. A. It was.

(Counsel for complainant offers in evidence the letter last shown in evidence, and the same received and filed, marked "Complainant's Exhibit No. 21 1-2. G. A. B., Ex., without objection.)

Q. I show you a letter dated Portland, Oregon, August 2nd, 1893, addressed to J. McMullen, Esq., San Francisco, and I will ask you in whose handwriting is this letter, if you know, and whose signature is appended to it.

A. It is in the handwriting of Mr. Hoffman and that is his signature.

Q. Was it received by you in the ordinary course of business? A. Yes, sir.

(Counsel for complainant offers in evidence the letter last shown the witness, and the same is received and filed, marked "Complainant's Exhibit No. 21 1-2," G. A. B., Ex., without objection.)

Q. I show you a letter dated Portland, Oregon, June 3rd, 1893, addressed to J. B. C. Lockwood, Esq., engineer, San Francisco Bridge Company, Seattle, Washington; do you know by whom the signature to that letter was made.

A. No, I do not. It is the signature of Hoffman & Bates, by somebody in the firm, possibly Andy. I cannot identify Andy's handwriting.

Q. I will ask you how this letter came into your possession. (Objected to by defendant as immaterial.)

[364] A. It was forwarded to me by Mr. Lockwood.

Q. Who was Lockwood at that time?

(Same objection.)

A. Lockwood was the agent and engineer of the San Francisco Bridge Company, at Seattle, in charge of our office there.

Q. I will ask you if you know what the matters specified in this letter relates to—what work or business?

(Same objection.)

A. It relates to the pipe line contract.

(Counsel for complainant offers in evidence the letter last shown the witness; objected to by defendant on the ground

that the same has not been properly identified; counsel for complainant withdraws the offer of the letter referred to, for the present.)

No cross-examination.

Witness excused.

H. D. BUSH is called as a witness for the complainant, and being first duly sworn, testified as follows

Direct Examination.

Questions by Mr. L. B. Cox:

Q. What is your occupation?

A. Civil engineer.

Q. State what, if any, connection you had with the work
[185] done by Lee Hoffman of Portland, Oregon, in the years 1893, 1894, and 1895, especially in the two former years, in the matter of bringing water from Bull Run to the city of Portland under contract between him and the water committee of the city of Portland.

A. Well, I was in Mr. Hoffman's office, and made an estimate for him of the costs of the work—made out the bids which were put in, and after the contract was awarded to Hoffman & Bates I did what I could to get everything ready for the work, made drawings for derrick, tools, etc., that were used.

Well, you need not speak with detail, nor do I direct your attention to anything that transpired before the actual commencement of the work, after this contract had been let.

Mr. COX.—I also move to strike your answer as to what was done by you in connection with the bid for the work.

Mr. MALLORY.—I object to that, as the answer is entirely responsive to the question.

Q. I ask you what connection you had with Hoffman in the execution of the work under the contract with the city of Portland; just answer generally.

A. Well, as far as the execution of the work was concerned, I made everything ready in the way of preparing tools, etc., for the work.

Q. Were you in Hoffman's employ during that time?

A. Yes, sir. Then during the first two months of the work
[186] I acted as engineer, and Mr. Foy was at that time superintendent. After Mr. Foy went away I was both engineer and superintendent, and had charge of all the work.

Q. I show you a letter, dated Portland, Oregon, April 28, 1893, with a descriptive design, and specifications attached to it, said letter being addressed to George W. Catt, Esq., vice-president, San Francisco Bridge Company, World Building, New York City; by whom was that letter written, if you know?

A. This letter was written by myself.

Q. By whom is the signature thereto attached?

A. Well, that is my writing, Hoffman & Bates, B.

Q. In what connection, or in connection with what work, was that letter written?

A. In connection with the work of building the Bull Run pipe line—preparing the details of it.

Q. During the time of your employ by Hoffman?

A. Yes, sir.

Q. And on his behalf? A. Yes, sir.

(Counsel for complainant offers in evidence the letter last shown the witness with the documents attached, and the same is received and filed, marked "Complainant's Exhibit No. 23," G. A. B., Ex., without objection.)

Q. I show you a letter, dated Portland, Oregon, May 16, 1893, addressed to George W. Catt, Esq., World Building, New York, signed Lee Hoffman; were you acquainted with the signature of Lee Hoffman during his lifetime?

A. Yes, sir.

Q. How did you learn it?

A. By constantly seeing it.

[367] Q. You may state whether or not that is the signature of Lee Hoffman, in your judgment?

A. In my judgment it is.

Q. Who was Catt at that time, and what was his occupation?

A. Mr. Catt was vice-president of the San Francisco Bridge Company, and had charge of their business in New York City.

Q. Are you familiar with the matters which are referred to in this letter? A. Yes, sir.

Q. To what business did such matters relate?

A. To the business of preparing some tools for work on the pipe line.

Q. This Bull Run scheme? A. Yes, sir.

(Counsel for complainant offers in evidence the letter last

shown the witness, and the same is received and filed, marked "Complainant's Exhibit No. 24," G. A. B., Ex.)

Q. I show you a letter which was exhibited to the witness McMullen, which is dated Portland, Oregon, June 3, 1893, addressed J. B. C. Lockwood, Esq., engineer San Francisco Bridge Company, Seattle, Washington; do you know by whom the signature to that letter was made?

A. That was made by Andy Donnell.

Q. Who was he at that time?

A. Mr. Donnell was general clerk in the office.

Q. Whose office?

A. In the office of Hoffman & Bates—in Mr. Hoffman's office.

Q. I will ask you to state if you know to what business matters that letter related?

A. To the business of getting together an outfit for the work on the Bull Run pipe line.

388] (Counsel for complainant offers in evidence the letter last shown the witness, and the same is received and filed, marked "Complainant's Exhibit No. 25," G. A. B., Ex.)

No cross-examination.

Witness excused.

Complainants rest.

H. D. BUSH is recalled as a witness for the defendant.

Direct Examination.

Questions by Mr. MALLORY:

Q. Mr. Bush, you may state your name, age, residence, and occupation.

A. My name is Harry Dean Bush, 38 years old; my present residence is Springfield, Massachusetts; I am a civil engineer.

Q. Were you ever at any time in the employ of Lee Hoffman?

A. Yes, sir.

Q. When did you first enter his employment, and how long did you remain in it?

A. I entered his employ in September, 1892, and remained until December, 1895.

Q. What business were you engaged in in 1892?

A. The first work was bidding for the Burnside Street Bridge, Portland, and after that I made plans and estimates for any work that happened to come along.

[369] Q. What, if anything, had you to do while you were in the employ of Mr. Hoffman in making estimates or bids for bringing Bull Run water to Portland?

(Counsel for complainant objects to the question as incompetent and immaterial, and now by consent of counsel for defendant, for the sake of convenience, enters a general objection to hold throughout the examination to any and all evidence offered by the defendant touching any matters which transpired in connection with the work of bringing Bull Run water to Portland, on the contract between Lee Hoffman and the water committee of the city of Portland, prior to the execution of the contract between the complainant herein and Lee Hoffman, "Complainant's Exhibit No. 1," on the ground that the same is immaterial.)

A. Mr. Hoffman went to San Francisco some two weeks before the time of opening bids; he instructed me before he went away to make an estimate of the cost of manufacturing and laying pipe so as to be able to prepare a bid on his return.

Q. Do you know what was the result of that estimate as to the cost of manufacturing and laying pipe?

A. Yes, sir.

Q. What was it?

Mr. COX.—Let me ask you if that was in writing?

The WITNESS.—Yes, I have the original estimate here. (Witness produces a document.)

Mr. COX.—The witness having produced the writing, being the estimate which he made, I object to any statement being made therefrom other than the estimate itself.

Q. Have you the paper which was the original writing?

A. I have my original estimates.

[370] Q. You have it in your hands now?

A. Yes, sir.

Q. In whose handwriting is it?

A. It is in my handwriting.

Q. You made it yourself? A. Yes, sir.

Q. You may refer to that estimate or memorandum unless you can do so without and state what was the result of your

estimate.

(Counsel for complainant objects to the question on the ground that it is incompetent.)

A. My estimate of the cost of manufacturing and laying the 42 inch pipe, including the hauling of that part of the pipe was \$36.00 per ton.

Q. Mr. Bush, I will ask you to state what was the result, the final amount—the total amount of your estimate.

A. Well, that does not show on this estimate.

Q. It does not show? A. No, sir.

Q. Have you now any recollection of what it was?

A. It simply means to multiply the number of tons by the cost per ton.

Q. Have you the number of tons there?

A. I have, sir.

Q. When I refer to the work, I mean the entire work, including the cost and profit.

A. This estimate covers a profit of \$9.00 per ton, making the cost of the pipe \$45.00 per ton, and figuring at 2½ cents per ton for 11,782,000 pounds, this would have made the first item \$265,090.00.

Q. Is that the total bid for manufacture and laying the pipe? A. No, sir, that is the amount of the first item.

371] Q. I do not care to go through the details, what I want to know is the total amount, or the final amount of your estimate to be bid for the manufacture and laying of the pipe.

A. The total amount of my estimate was \$420,257.00.

Q. You said that Mr. Hoffman went away to San Francisco, and on his return directed you to make some figures; these are the figures that you submitted to him on his return?

A. Yes, sir.

Q. What occurred on his return, if anything, in relation to preparing bids on this work for the manufacturing and laying of the pipe, plates, etc.?

A. Well, Mr. McMullen came up with him, and Mr. Hoffman informed me that he and Mr. McMullen were going to bid together for the work; Mr. McMullen had a great many estimates and figures and letters referring to the cost of the work, and I went all through those.

Q. Now, state exactly what occurred—what Mr. McMullen said or done about the matter when he came here.

A. I don't think I fully understand the question.

Q. What did Mr. McMullen do—what was said or done by him about this matter on Mr. Hoffman's return; did he bring the papers with him, or say anything about the work?

A. He brought a lot of papers in the office, and showed them to me and said that represented the result of researches on the Bull Run pipe line, and that there were estimates there from the New York, and also from the San Francisco office.

Q. By whom were the estimates made at the New York office?

[372] A. There were complete estimates made by Mr. Catt, going into all the details, and the cost of the job, plant, tools, etc.

Q. I will call your attention to this paper, and ask you if you know what it is. (Showing witness a paper.)

A. This particular sheet, (referring to the first page of the paper) is a copy of Mr. Catt's estimate of the job for making the pipe.

Q. What is the next sheet?

A. This (referring to the second sheet) is a copy of Mr. Catt's estimate of the cost of making the pipe.

Q. And the next, if there is any more?

A. This (referring to the third page) is a copy of Mr. Catt's bid as he had made it out, and set down opposite those items are the figures that we actually put in, showing the difference between the two.

Q. What do you know about those figures as to whether they are the same figures or copies of the same figures that were presented to you by Mr. McMullen on Mr. Catt's bid?

A. Well, I copied those myself, and I am certain it is an exact copy.

Q. Who furnished you with the original of that?

A. Mr. McMullen brought a copy to the office.

Q. Did you ever have any talk with Mr. McMullen about Mr. Catt?

A. Yes, sir, I think McMullen said it was Mr. Catt's estimate.

Q. What is the total of the estimate of Mr. Catt for the manufacture and laying of the pipe?

[373] (Counsel for complainant objects to the question on the ground that it is incompetent.)

A. The total for manufacturing and laying the pipe is \$416,038.00.

Q. What, if anything, was done in regard to preparing any other bid than that by Mr. McMullen and Mr. Hoffman and yourself?

A. Well, Mr. Hoffman thought that all the bids we had prepared were too low, and I made out other bids which were higher.

Q. And what was the final total of the bid that you made out, or which was made out for you by Mr. Hoffman?

A. The final total of that bid that we expected to put in, until within the last hour, was \$479,167.00.

Q. \$479,167.00? A. Yes, sir.

Q. What was the bid that you actually put in?

A. \$465,667.00.

Q. How did that come to be reduced?

A. Why, Mr. McMullen came into the office within the last hour, very much excited, and said that he had made up his mind that we were too high, and had got to take off something; we took off five cents a yard on the item of earth excavation; this amount is 270,000 yards at five cents a yard, amounting to \$13,500.00.

Q. That reduced the amount from \$479,167.00 to \$465,667?

A. Yes, sir.

Q. What did you say your estimate on the excavation was?

A. 35 cents a yard on 270,000 yards.

[374] Q. Now, have you had any conversation, or heard any conversation between Mr. McMullen and Mr. Hoffman about bidding for this work, and if so, I wish you would state what it was.

(Counsel for complainant objects to any statements which may have been made by Mr. Hoffman in this connection, on the ground that they were incompetent.)

A. Well, they had various conversations about the bidding—that they would bid together, so as to try to get as much of the work as possible, and it was decided finally that Hoffman & Bates' bid should be the lowest, or lower than the San Francisco Bridge Company's bid for the manufacturing and laying of the pipe and the San Francisco Bridge Company's bid should be lower than Hoffman & Bates' bid for furnishing the

plates, so that there might be a change to combine those two bids on both those two items.

(Counsel for complainant objects, and moves to strike out the testimony of the witness in regard to any other bid or work, except that now under consideration and involved in this suit, on the ground that it is irrelevant and immaterial, and I make the same objection to all of this testimony for convenience sake.)

Q. You speak of a bid being put in by the San Francisco Bridge Company; explain what you mean by that, and what there was about that.

A. It was understood between Mr. Hoffman and Mr. McMullen—

(Counsel for complainant objects to this testimony as to any understanding between Hoffman and McMullen, on the ground that it is incompetent.)

[375] Q. State as nearly as you can, M. Bush, what was said by Mr. Hoffman and by Mr. McMullen as to the manner in which they would each bid—what should be done, giving all the particulars of it as nearly as you can, what they said and if you cannot remember their language give it as nearly as you can.

(Counsel for complainant interposes same objection as to Hoffman's statement.)

Mr. MALLORY.—If you don't remember what was said, state the substance of what it was, and what the result of it was, if you remember.

(Same objection.)

A. Well, there was a great many conversations in my presence, the general idea being that they would each bid.

(Counsel for complainant objects to the testimony of the witness as to any general idea on the ground that it is incompetent.)

Q. Go on and state what it was.

A. Each would bid on his own account, and they would share in whatever portions of the work they might be successful in getting; as I before stated, Hoffman & Bates' bid should be lower for the manufacture and laying, and the San Francisco Bridge Company's bid should be lower on the delivery of the plates; that was the day the bids should be opened; that combination they were making to get as much of the work as possible.

Q. In what way? A. By combining—

(Counsel for complainant objects to this testimony as to what occurred the day the bids were opened, on the ground that it is immaterial and irrelevant.)

[376] A. (Continued.) By combining Lee Hoffman's bid on the manufacture and laying with the San Francisco Bridge Company's bid on the delivery of the plates, or if there was no bid between that combination—the Hoffman & Bates' bid on the manufacture and laying, and the San Francisco Bridge Company's bid on the delivery of the plates—that the San Francisco Bridge Company was to try to withdraw their bid on the delivery of the plates, so that the whole work should go to Hoffman & Bates.

Q. Did you hear anything said about the bid which was prepared by the San Francisco Bridge Company to put in—what was said about that, and how it was prepared?

(Counsel for complainant objects to this question, unless it is specified by whom these statements were submitted to him; question withdrawn.)

Q. Did Mr. Hoffman and Mr. McMullen or either of them, say anything about a bid being put in by McMullen in the name of the San Francisco Bridge Company?

(Counsel for complainant objects to any statements made by Mr. Hoffman on the ground that they are incompetent.)

A. Well, only in a general way, that the San Francisco Bridge Company should be higher on the manufacture and laying.

Q. It was understood that that should be done?

(Same objection.)

A. Yes, sir.

Q. Do you know whether Mr. Hoffman saw the bid of the San Francisco Bridge Company? A. Yes.

Q. Did Mr. McMullen show him their bid?

[377] A. Yes, sir.

Q. They each knew the other's bid? A. Yes, sir.

Q. The estimate that Mr. McMullen brought here of his engineer, Mr. Catt, what was the condition of that as to its being ready to be submitted as a bid for the work?

A. It was all ready to be submitted.

Q. Did it require any additional figures, or anything more than to put it in upon a form of the bid? A. No, sir.

Q. Now, what, if you know, was said by Mr. McMullen as to his intention of putting in his bid the estimate furnished by the engineer, Mr. Catt, of \$416,038.00 and if he did not put it in at that rate, state why, and state what reasons were given.

A. I think Mr. McMullen said that he was satisfied that was a perfectly safe bid; that Catt had gone over the thing very thorough.

Q. The reason that he did not put in that bid was because they thought they could get more money out of the job?

A. Yes, sir.

Q. At whose instance was it raised?

A. Well, Mr. Hoffman was always skeptical about doing the work for such little money, and kept on trying to have the bid increased.

Q. Do you know what was the bid of Hoffman & Bates for supplying the steel plates for the pipe?

(Counsel for complainant objects to the question as irrelevant.)

A. Yes, sir.

[378] Q. What was the amount of the bid that was agreed between Hoffman and McMullen as to the bid which should be submitted for supplying the plates?

A. You mean the bid that should be submitted by Hoffman & Bates?

Q. Yes.

A. The bid submitted by Hoffman & Bates was \$359,378.80.

Q. Now, do you know what was the bid for the same material by the San Francisco Bridge Company?

(Same objection.)

A. The San Francisco Bridge Company's bid for the delivery of the plates was \$348,781.00.

Q. What, if anything, was agreed upon between Hoffman and McMullen as to what should be done in case the bid of the San Francisco Bridge Company submitted by Mr. McMullen should be the next lowest to the bid of Hoffman & Bates on the item of furnishing the steel plates?

(Counsel for complainant object to the question as leading and suggestive, and also as irrelevant.)

A. Well, the bid of the San Francisco Bridge Company was lower than that of Hoffman & Bates.

Q. What, if any, agreement was there between them as to what course should be pursued by the San Francisco Bridge Company in case no bid was between the bid of Hoffman & Bates and the bid of the San Francisco Bridge Company?

(Same objection.)

A. Well, there was no agreement about any such contingency as that, Judge.

[379] Q. We will put it in another way; was there any agreement or understanding between Mr. McMullen and Mr. Hoffman as to what McMullen should do, or the San Francisco Bridge Company should do, in case their bid for the steel plates was the next lowest to the bid of Hoffman & Bates—as to the San Francisco Bridge Company withdrawing from the bid, or trying to withdraw from the bid and let the work go to Hoffman & Bates?

(Same objection.)

A. Well, there was some talk of either one of them withdrawing, if by doing so they could combine the bids to better advantage or get more work.

(Counsel for complainant objects to the question as irrelevant the witness after "there was some talk" about these matters, as being incompetent.)

Q. Well, you may state as nearly as you can, Mr. Bush, what agreement was had between them upon that subject.

(Counsel for complainant objects to the question as irrelevant.)

A. The agreement was about a combination of the bids on the two items of manufacturing and laying and the delivery of the plates; that those two items should be combined in the two bids in the best way that they could to get the most money out of the job; that in case the San Francisco Bridge Company's bid for the plates combined with the Hoffman & Bates' bid for the manufacture and laying made the lowest total, then the bid should be combined, and in case there was no bid between those two bids—between that total I have just spoken of—the total of the Hoffman & Bates bid on the manufacture and laying and the San Francisco Bridge Com-
[380] pany on the delivery of the plates, then the San Francisco Bridge Company should withdraw their bids for the plates.

Q. That could not only be ascertained when the bids were opened?

A. Yes, sir.

Q. Then, if I understand you, if it was ascertained upon opening the bids that the bid of Hoffman & Bates should prove to be the lowest bid for the manufacture and laying of the pipe, and the bid of McMullen, or the San Francisco Bridge Company, should prove to be the lowest for furnishing the plates, and that those two together would make the lowest total, it was agreed that the San Francisco Bridge Company should endeavor, if they could, to get relieved from their bid, and let Hoffman & Bates take it on their bids for the plates?

A. If there was no bid between?

Q. Yes, if there was no bid between, but as a matter of fact there was a bid between.

A. Yes, and there was a bid lower than the total of those two bids.

Q. There was a bid between the bid of the San Francisco Bridge Company on that particular work—on the plates, I mean now?

(Counsel for complainant objects to the question as irrelevant, and also desires to know what the witness' source of information was concerning these outside matters.)

A. Well, there was no bid between those two on the plates, but there was a bid lower than either of them; there was a bid of the Risdon Iron Works.

Q. So that the bid both of the San Francisco Bridge Company and Hoffman & Bates was higher than the bid of the Risdon Iron Works?

(Same objection.)

A. Yes, sir.

Q. Did you observe the bids that were submitted by the San Francisco Bridge Company and Hoffman & Bates on the iron for bridges included in the same bid that was submitted to the committee?

(Objected to as irrelevant.)

A. Yes, sir.

Q. Do you know what was the bid for bridges by Hoffman & Bates?

(Same objection.)

A. Hoffman & Bates' bid for the bridges was \$33,562.94.

Q. What was the bid of the San Francisco Bridge Company?

A. Their bid was \$31,279.07 for bridges.

Q. Do you know what was the bid of Hoffman & Bates for head works, included in that bid?

(Same objection.)

A. Hoffman & Bates' bid for head works was \$17,800.00.

Q. And what was the bid of the San Francisco Bridge Company for the head works?

(Same objection.)

A. \$16,550.00.

Q. After the letting of this work—this contract—what did you do?

A. You mean as regards construction?

[382] Q. Yes, sir.

A. Well, there was a space of three months before the work actually begun, and I did everything I could towards getting ready, getting tools prepared, and when the work first started my principal work was going back and forth between the shop and field, trying to get the pipe out there, and getting the pipe made fast enough at the shop; the subcontractors were very slow at first in getting the pipe from the shop; and in a general way I got ready all the tools for riveting, and I hired a good many riveters and sent them out—riveters and calkers—and I went over to Vancouver at one time; I only got one man there that I intended to make a foreman of; he afterwards had a subcontract for the riveting and calking. Mr. Foy was made superintendent of the work.

Q. What time?

A. At the beginning of the actual construction.

Q. Do you know when that was?

A. That was early in June.

Q. How long did he continue as superintendent?

A. I think until the 1st of November, 1893.

Q. Of the same year? A. Yes, sir.

Q. Who became superintendent after he quit?

A. I was superintendent after that time.

Q. Until the completion of the work?

A. Yes, sir.

Q. Do you know what Mr. Foy did, if anything, in connection with the work after he ceased to be superintendent?

[383] A. After he ceased to be superintendent he had a contract for excavation—excavating the ditch from the head works down to pretty close to Mr. Andre's house on the line; I think

it was about four miles of ditch.

Q. While he had that contract he was not then superintendent? A. No, sir.

Q. You were superintendent then?

A. Yes, sir.

Q. What do you know, if anything, Mr. Bush, about some plant that was brought over here from Seattle?

A. There was a kind of grading outfit brought over—some scrapers, plows, tents, and cook utensils.

Q. Do you know what those things were worth?

A. Well, I would not know exactly.

Q. Can you make an estimate—something near what they were worth?

(Objected to on the ground that the witness is not competent to answer.)

A. I think the bill was something like \$2,800.00. Mr. Hoffman said the bill was pretty high.

Q. I will ask you now if you are acquainted with such material as that, and with the prices of such material as that.

A. Well, I could not make a price; no, sir. I would have to get prices.

Q. You would not be able to give an opinion as to this work? A. No, sir.

Q. Were you about the place and upon the work nearly all the time from the time that you began in June until the end of the work?

A. Yes, sir, nearly all the time.

Q. Do you know what Mr. McMullen did about the work?

A. Well, he came out there two or three times to see us.

[384] Q. How many times do you think he was out there—do you remember of his being there?

A. I remember not more than three times.

Q. When was that, do you know?

A. I think he was out there twice in 1893 and once in 1894.

Q. About what time in 1894?

A. He drove out there when we were working on the section line road; it was in June, I think.

Q. Did he come alone? A. Yes, sir.

Q. What did he do while he was there?

A. He looked at the work.

Q. How long did he stay?

A. I think two or three hours.

Q. While this work was going on, what was Mr. Hoffman doing—where was he?

A. Well, he was out on the line very often, and was away in the city looking after supplies.

Q. Do you know about Mr. Hoffman having gone to Chicago in 1893? A. Yes, sir.

Q. About what time was he gone—how long?

A. Well, I could easily tell from the letter book I think he was gone about three weeks in the month of October, as I remember it.

Q. Who was in charge of the work during his absence?

A. Well, Mr. Foy and myself; I was in charge of Mr. Hoffman's part of the work; I had authority to represent him at the water committee, and look after the receipts and estimates [85] and make any arrangements that were necessary there.

Q. Was anything to be done by Mr. Hoffman that was neglected in consequence of being away?

A. I think not.

Q. Do you know of Mr. Hoffman having visited Yellowstone Park while you were in his employ?

A. I think Mr. Hoffman went to Yellowstone Park in the summer of 1895, when the work was all over; that is my impression.

Q. Do you know of his having made a journey to the Sandwich Islands sometime in 1895?

A. Yes, sir.

Q. When was that?

A. That was in the spring of 1895.

Q. Before or after the work of laying the pipe was completed? A. It was after it was finished.

Q. It simply had not yet been accepted by the water committee? A. Yes, sir.

Q. Do you know what was the cost of the hydraulic punch and shears that was in use on the work?

A. I think the punch was \$75.00 and the shears was \$150.00.

Q. Were there some forges in use on the line for heating the rivets? A. Yes, sir.

Q. How many of those were there?

A. Well, we bought one dozen at first, and then bought some two or three afterwards.

Q. What were they worth a piece.

A. The list price was \$35.00; I think it was about \$30.00 they actually cost.

[386] Q. Have you any knowledge of who paid for those, or don't you know anything about that?

A. No, sir, I have no knowledge of that.

Recess until 1:30.

Afternoon session; present, the same parties as before. H. D. BUSH resumes the stand.

Cross-Examination.

Questions by Mr. L. B. COX:

Q. Where have you been residing, Mr. Bush, since you terminated your connection with Mr. Hoffman in regard to the Bull Run work?

A. I resided until last July in the city of Portland; then I went east and resided in the town of Sharpsberg, Pennsylvania, and stayed there until the middle of December.

Q. Where have you been residing since?

A. Since that time I have been at home, in Springfield, Massachusetts.

Q. Did you come to Portland at the solicitation of the defendant in this suit?

(Objected to as immaterial.)

A. Partly so.

Q. You were solicited to come for the purpose of giving evidence in this case?

A. Yes, sir.

[387] Mr. COX.—I desire these reporters to note that all cross-interrogatories addressed to witnesses touching matters which happened antecedent to the execution of "Complainant's Exhibit No. 1" are subject to the ruling of the Court as to the materiality of such matters.

Q. I did not quite understand what you said about this combination bidding between McMullen and Hoffman, or the San Francisco Bridge Company and Hoffman. How was it that they were going to combine their bids—on a general average?

A. The Hoffman and Bates' bid on manufacturing and laying was \$465,667.00, and the San Francisco Bridge Company's bid on the plates was \$348,781.00, making a total for the two of \$814,448.00. Now, it was understood if that was the low-

est total that then they were to make an effort to have Hoffman and Bates' bid on the delivery of the plates accepted, and have the San Francisco Bridge Company's bid on the delivery of the plates withdrawn, which would raise the total they were to receive on the delivery of the plates about \$10,000. The exact total would be \$824,945.80.

Q. Then if Hoffman was the lowest bidder on one item and McMullen the lowest bidder on the other item it was agreed that they would drop the low bid on McMullen's item, and endeavor to give the contract to Hoffman if he was the next?

A. Yes, sir.

Q. So, then, they would pool the two bids and substitute for the lowest bid on the plates the next lowest if that was Hoffman's, and divide the proceeds of both contracts?

A. Yes, sir.

Q. You say that McMullen, when he came here, had in his possession an estimate from George W. Catt, of New York, [88] which he represented he was willing to take as a basis of the bid which he would submit for the work?

A. Yes, sir, that is the way I understand it.

Q. You are quite clear in your mind as to that, are you?

A. I am quite clear that Mr. McMullen expressed himself that that would be a safe bid.

Q. How long was McMullen here before these bids were opened? A. I think two or three days.

Q. What day, do you remember, were the bids submitted?

A. I do not remember the exact date.

Q. Was it not the first day of the month?

A. The first or second of the month; I think it was the first.

Q. Your recollection is that McMullen was here three or four days prior to that time? A. Yes, sir.

Q. Now, Mr. Bush, is it not a fact that neither McMullen or Hoffman, nor anybody else to your knowledge who bid on this work, prepared a bid until immediately before it was submitted?

A. Our bid was practically prepared the day before.

Q. Did not you state in your direct examination that about an hour before it was submitted McMullen rushed in in a good deal of excitement and requested it to be reduced some \$13,000.00? A. Yes, sir

Q. Then it was not ready for presentation until about an hour before it was submitted in the form it was submitted?

[389] A. It was not ready in the form it was submitted finally; no, sir.

Q. Now, is it not a fact, Mr. Bush, that both McMullen and Hoffman, during all the time after Hoffman arrived here, were in receipt of advices in regard to estimates on this work, which constantly caused them to change the ideas which they would have upon the date of the receipt of such advices?

A. I do not remember anything that would cause them to change the bid on the manufacturing and laying.

Q. You do not? A. No, sir.

Q. Is it not a fact that slight changes in the matters of freight, cost of material, or cost of labor brought to their attention at any time before their bid was submitted would have a tendency to make a radical difference in the estimates for their bid?

A. I do not know of anything that would be likely to come up that would make radical changes.

Q. You do not? A. No.

Q. Is it not a fact, Mr. Bush, that both Hoffman and McMullen during the several days that you were figuring together on this bid were making changes in their estimates based upon advices which they were receiving from time to time from Mr. Catt, of New York, and from the San Francisco office of the San Francisco Bridge Company and from other quarters?

A. I do not know of anything that was in doubt except the price of plates. The estimate for that was changed, perhaps, in accordance with advices and telegrams received.

Q. What were Hoffman and McMullen doing during these three or four days if it was not necessary for them to keep constantly apprised of these changes, and to shift their grounds on their estimates accordingly?

A. Well, I think they were endeavoring as much as they could to find out what the other fellows were going to bid.

[390] Q. You were representing Mr. Hoffman and assisting him in making estimates, were you not?

A. Yes, sir.

Q. Did you not make a great many estimates, or I will say several estimates during those days?

A. Well, I made several estimates; yes, sir.

Q. And is it not a fact that you were making these several estimates because they had not agreed upon any bid when McMullen first arrived here—neither one of them?

A. Yes, I think it was a fact that they had not agreed upon a bid.

Q. And these different estimates which you were making were in consequence of their want of agreement in regard to the amount of the bid to enable them to finally arrive at a bid which would be satisfactory, and would be submitted to the water committee?

A. Yes, sir.

Q. I show you a telegram dated New York, 27th of February, 1893, addressed "J. McMullen, Hotel Portland, Portland, Oregon," signed George W. Catt; was that telegram before you and did you see it during the time that you were making these estimates on the amount of the bid which was put in for the manufacture and laying of steel pipe?

1] (Counsel for complainant object to the question as immaterial and not cross-examination.)

A. Well, I saw that telegram because there are the pencil marks there that I made.

(Counsel for complainant asks to have the paper just shown to the witness marked by the examiner for identification, and the same is marked "For identification No. 4, January 22nd, 1896," G. A. B., Ex.)

Q. I show you a letter, dated New York, February 22nd or 21st (as both dates are on the letter), 1893, addressed "J. McMullen, President, San Francisco Bridge Company, San Francisco and Portland," signed San Francisco Bridge Company by George W. Catt; did you see that letter during the progress of the estimates you were making?

(Counsel for defendant objects to the question as immaterial and not cross-examination.)

A. Well, I could not certainly say whether I did or not.

Q. You do not remember taking those facts into consideration in your calculation?

A. No, sir.

(Counsel for complainant asks to have the letter last shown to the witness marked by the examiner for identification, and the same is marked "For identification No. 5, January 22nd, 1896," G. A. B., Ex.)

Q. I show you a letter, dated New York, February 22nd, 1893, addressed, "J. McMullen, President, San Francisco Bridge Company, San Francisco and Portland," signed San Francisco Bridge Company by George W. Catt; did you see that letter and act upon it during the course of the estimates you were making for the manufacture and laying of steel pipe?

(Objected to as immaterial and not cross-examination.)

A. Well, I cannot say whether I saw the letter or not, but I certainly did not act upon it.

[392] (Counsel for complainant asks to have the letter last shown the witness marked by the examiner for identification, and the same is marked "For identification No. 6, January 22nd, 1896," G. A. B., Ex.)

Q. I show you what purports to be a press copy of a dispatch, having no date, addressed "J. McMullen, Hotel Portland, Portland, Oregon," and signed H. S. Wood; was that before you at the time you were making your estimates and did you act upon it?

(Counsel for defendant objects to the question as immaterial and not cross-examination.)

A. I do not think I ever saw that before.

(Counsel for complainant asks to have the paper last shown the witness marked for identification, and the same is marked "For identification, No. 7, January 22nd, 1896," G. A. B., Ex.)

Q. In making estimates for the bids which were finally put in by Hoffman in the name of Hoffman and Bates, and by McMullen in the name of the San Francisco Bridge Company, you as representing Hoffman figured jointly with the representative or representatives of McMullen, did you not, in arriving at an estimate upon which the bid should be submitted?

A. I did most of the figuring. Mr. Lockwood was in there some of the time. Mr. McMullen and Mr. Hoffman both came and looked over the figures occasionally.

Q. Who was Mr. Lockwood?

A. He was the Seattle agent of the San Francisco Bridge Company.

Q. Then while you may have done the bulk of the work, the fact is that you and Lockwood were working together and

93] McMullen and Hoffman were supervising, or at all events were cognizant of what you were doing?

(Counsel for defendants object to the question, as assuming that the witness has stated what he has not stated.)

A. Mr. Lockwood was not there but very little. I cannot say that we were working together. Of course, Mr. McMullen and Mr. Hoffman were cognizant of what I was doing.

Q. What was Lockwood doing?

A. He came down here as I understand it to see Mr. McMullen about the bridge business.

Q. About some bridge business?

A. Yes, sir, particularly.

Q. Did McMullen have any other professional visitor here at the time he was preparing the bid on this work except Lockwood? A. Not that I know of.

Q. I show witness a document entitled "Proposals for manufacturing and laying (C)," addressed to Frank T. Dodge, clerk of the water company of the city of Portland, dated March 1st, 1893 (5), and signed San Francisco Bridge Company by J. McMullen, President; did you ever see that before? (Showing the same to witness.)

A. I think that is the bid that Mr. Lockwood made out on the morning of the letting for Mr. McMullen.

Q. Were you present when that was made out?

A. Yes, sir.

Q. Where was it made out?

A. In the office of Hoffman and Bates.

Q. By Lockwood? A. Yes, sir.

394] Q. Is that his handwriting excepting signature of McMullen?

A. I do not know his handwriting. I remember that he made out a bid; I suppose that is his handwriting.

Q. Then Lockwood was here and he did compute and arrange McMullen's bid? A. Yes, sir.

Q. I show you a similar paper entitled "Steel conduit from head works to Mt. Tabor, proposal for manufacturing and laying," dated Portland, Oregon, March 1st, 1893, addressed to Frank T. Dodge, clerk of the water committee, city of Portland, Oregon (9), signed Hoffman and Bates, per Lee Hoffman; did you ever see that paper before? (Showing same to witness.)

A. Yes, sir, that is the Hoffman and Bates bid for manufacturing and laying.

Q. By whom was it prepared?

A. Well, I prepared a bid similar to this with the figures in writing and Mr. Donnell printed the figuring on the type-writer.

Q. Then that is a transcript of the bid which you prepared?

A. Yes, sir.

Q. Now, is it not a fact, Mr. Bush, that you and Lockwood and McMullen and Hoffman were all cognizant of the contents of both of these bids?

A. Yes, sir, I think it is.

Q. Is it not also a fact that you all were cognizant of both bids put in for the furnishing of the steel plates for this work?

A. Yes, sir.

Q. Hoffman knew what McMullen's bid was and McMullen knew what Hoffman's bid was?

A. Yes, sir.

[395] Q. In the estimate which you made on the manufacturing and laying of steel pipe I understand that you figured on a 42-inch pipe at a cost of \$36.00 per ton and a profit of \$9.00.

A. Yes, sir.

Q. Is that the pipe which was called for and adopted by the water committee?

A. Yes, sir, that particular pipe. I separated the 42-inch pipe from the other on account of the difference in hauling.

Q. It was not all 42-inch pipe?

A. No, sir.

Q. I understand that the aggregate estimate at which you arrived upon which a bid might be predicated for all the work in connection with the manufacturing and laying of the steel conduit from the head works of this system to Mt. Tabor was \$420,257.00.

A. Yes, sir.

Q. Now, that was raised afterwards to \$479,167.00?

A. Yes, sir.

Q. Who made that raise?

A. Hoffman told me to raise it. Hoffman and McMullen talked the thing over that there ought to be more profit in it.

Q. Hoffman and McMullen together?

A. Yes, sir.

Q. What was the occasion of their making the raise?

A. So as to increase the bid. They thought it was safe to increase it.

Q. Is it not a fact that this raise was made in consequence of advices that they were receiving from time to time in regard to the matter?

[396] A. No, sir, it was simply a question of the amount of profit.

Q. Simply a question of profit? A. Yes, sir.

Q. When was this amount of \$479,167.00 arrived at?

A. I think the day before the bids were let.

Q. Then neither you, Hoffman nor McMullen the day before the letting had arrived at any final figures at all?

A. No, sir.

Q. McMullen came back the next morning, as you stated, in a condition of excitement and said that this bid was too high, and that it must be reduced, and it was reduced in consequence of his representation to the figures \$465,667.00, which was the amount of the bid submitted by Hoffman?

A. Yes, sir.

Q. Do you know the amount of the next highest bid?

A. I have it on this sheet (referring to document in witness' hand).

Q. You have given testimony in regard to a number of bids other than the one prepared by you. What was the basis of your knowledge concerning which or upon the strength of which you have testified?

A. Well, this is the official statement of Col. Isaac W. Smith as to all the bids which he had published at that time (referring to document in the hands of the witness).

Q. That was published after the bidding was all done, was it?

A. Yes, sir.

Mr. COX.—I move to strike out all the evidence which the witness gave relative to the bid submitted by persons other than the San Francisco Bridge Company and Hoffman & Bates, on the ground that his testimony in regard thereto is incompetent.

[397] Q. When Mr. McMullen came from San Francisco he had a number of estimates or calculations other than that which you understood had been made by Mr. Catt, had he not?

A. Yes, sir.

Q. Were those estimates taken into consideration in connection with the bid which you afterwards prepared?

A. They were all taken into consideration in the estimate that was made for the actual cost of the work.

Q. And they were all made use of in the calculations in regard to that matter? A. Yes, sir.

Q. And when Hoffman came back from San Francisco just before the letting of this work, McMullen came with him, you say?

A. I think so, yes, sir.

Q. After Hoffman said that McMullen was going to bid with him on the work?

A. Yes, sir; they were going to bid together.

Q. You have identified a paper shown you by counsel for defendants as a copy of the estimate made by Mr. Catt, together with certain changes which were afterwards made, and which gave the aggregate amount of the bid submitted by Hoffman in the name of Hoffman & Bates for the manufacture and laying of steel pipe.

A. Yes, sir.

Q. By whom were these changes afterwards made?

A. I do not understand exactly what you mean.

Q. By whom were the new figures made?

A. The new figures were made by myself. This is a copy of their bid.

[398] Q. How did you make that—just at random, simply arriving at an increase of Mr. Catt's estimate, or by a careful calculation as to what should be submitted on each item?

A. The pencil item is the first one, so many pounds of rivets, and the change in that was made by adding more profit, and the other items, with the exception of the change at the last moment, represented the best information I could get on the subject.

Q. The best information you could get up to the last moment, you say? A. Yes, sir.

Q. Now, I notice the first item to which you refer on the Catt estimate is \$282,768.00, and on your estimate it is \$324,000.00—that is, for manufacturing and laying of the pipe; how did you arrive at that change in figures—just made a guess, or by careful consideration of all elements which would enter into the cost of furnishing the material and doing the work?

A. No, sir; we decided in the beginning that as three estimates of the cost corresponded so closely, that that sum settled the question of cost. After that it was simply a question of how much profit to add.

Q. What estimates do you refer to?

A. The estimates Mr. McMullen brought from San Francisco, by Mr. Wood and Mr. Catt's estimate, and mine.

Q. Then you did take them all three into consideration?

A. Yes, sir.

Q. The next item in this Catt estimate is \$7,500.00, or \$7,560.00 for manholes, and the corresponding item in your estimate is \$4,500.00. There is a reduction of \$3,000—you did not make that for the purpose of increasing the profits, did you?

[399] A. Well, we got so much profit on the first item we wanted to make the other items tolerably close.

Q. Then you figured closely on your estimate for that item of \$4,500.00? A. Yes, sir.

Q. I notice an item here of concrete foundation in the Catt estimate. It is \$720.00, and in your estimate it is \$600.00—you did not make that change for the purpose of increasing the profit on that item? A. No, sir.

Q. Here is an item of sleeve joints, wrought iron, \$700.00 in Catt's estimate, and \$490.00 in your estimate—that was not made for the purpose of increasing the profit, neither, was it?

A. No, sir.

Q. Here is an item for concrete work, \$4,800.00 in Catt's estimate, and in your estimate \$3,200.00; the change was not made there for the purpose of increasing the profit?

A. No, sir.

Q. Here is an item in Catt's estimate of \$90,000.00 for excavation of earth, and in your estimate of \$81,000.00 how did you arrive at that difference?

A. Well, my original estimate for the earth was \$94,500.00. That was the item from which we took off \$13,500.00. That left \$81,000.00.

Q. Then you did not accept Catt's estimate in regard to that item, at all?

A. Well, the variation is very slight.

Q. A variation of \$4,500.00?

A. Well, that is not very much, considering the difference in the principal item.

Q. Now, is it not a fact, Mr. Bush, in regard to the matter of labor, freight rates, and cost of handling material, that no reliance was placed upon Catt's estimate, because he lived in

[400] New York, and was not on the ground and was not familiar with such conditions prevailing here?

A. A reliance was placed on his estimate on the main item for the manufacturing of the pipe.

Q. And on nothing else?

A. Not so much on those minor items.

Q. Is it not a fact that Catt's figures were accepted as a safe guide in the matter of manufacturing the pipe, which was a work that could be done anywhere in the east, where Catt lived, as well as here?

A. Yes, sir.

Q. And was within the control of the man who got this work, but in regard to local matters, things that must be done here that necessarily were subjected to conditions prevailing here, Catt's estimate was not recognized by either McMullen or Hoffman as being the safe guide?

A. No, sir; I do not think that is a fact.

Q. You think that is not the fact?

A. No, sir; that is not the fact.

Q. To what extent was it recognized as being a safe guide?

A. I think it was recognized as being a pretty safe guide all the way through.

Q. I understood you to say a moment ago that it was accepted only as a guide on the manufacture of the pipe.

A. Well, that was the one item that we considered of the greatest importance.

Q. Here is quite a large item for earth excavation, \$90,000.00, according to Catt's estimate, and \$81,000.00 according to your estimate; is it not a fact that Catt was considered to know very little about that matter at all?

[401] A. I do not think so.

Q. Mr. Catt had never been over the ground?

A. He had never been over the ground, but he knew the conditions of the country. He had lived in this country.

Q. Did he know the conditions prevailing on this pipe line in regard to labor and material to be removed?

A. I presume that he did not know the exact conditions—the conditions in detail.

Q. Before you made an estimate on that part of the work you went over the line, did you not, and saw the character of the material to be contended with?

A. Yes, sir.

Q. Every other man who put a bid in on this work did the same thing, did he not?

A. No, I cannot say that. I think there was quite a number of them that did not.

Q. Do you know of others that did do it?

A. Yes; as far as I know of all the parties here there was only one, outside of myself, that went over to the line.

Q. As far as you know? A. Yes, sir:

Q. Now, will you say that it would have been a safe and business-like matter for Hoffman or McMullen to have accepted the estimate of Catt, living in New York, who had never been on the line of pipe and did not know what material was to be moved, as a safe calculation of the cost of doing that work upon which a bid was to be predicated?

(Counsel for defendants object to the question as a mere matter of opinion, and not cross-examination.)

402] A. I think it would be safe for them to accept his estimate within reasonable limits of accuracy.

Q. Hoffman sent you over to the line before he would accept your estimate; is that not the fact?

A. Yes, sir, that is the fact.

Q. And did you not figure with a great deal of care, Mr. Bush, in regard to the estimate you arrived at as to the cost of doing this work?

A. I figured it with all the care I could; yes, sir.

Q. And Hoffman did, and McMullen did? A. Yes, sir.

Q. You say that Hoffman thought that all these items were too low when they were first brought to his attention?

A. Yes, sir.

Q. What do you mean by that; do you mean that he thought they were too low to do the work, or that they might be raised and still get it?

A. He thought it was too low to be safe. He thought if they got the work on those figures they would lose money.

Q. Hoffman was a man of experience?

A. He was a general contractor, yes.

Q. He had done a great deal of that work, had he not?

A. He had never done any pipe-line work.

Q. He had done work of that general character?

A. No, sir.

Q. Had not? A. No, sir.

Q. What did you say in regard to increase of McMullen's bid? You gave some testimony about that on the manufacture and laying of steel pipe.

A. Above Mr. Catt's original estimate, do you mean?

[403] Q. Yes, above Catt's estimate.

A. I do not think I gave any testimony as to that.

Q. It is a fact, is it not, Mr. Bush, that Hoffman deposited a check with each bid to the amount of 5 per cent of the amount of the bid? A. Yes, sir.

Q. And McMullen did the same thing?

A. Yes, sir.

Q. It is also a fact, is it not, that if a party submitted a bid and he proved to be the lowest bidder, but failed to comply with his bid and take the work at that figure, he forfeited his check to the water committee?

A. That was supposed to be the case.

Q. That was supposed to be the case?

A. Yes, sir.

Q. That was the rule or the announcement upon which these bids were submitted, or tendered, or acted upon, was it not? A. Yes, sir.

Q. In reducing Hoffman's bid you made a cut on the earth excavation? A. Yes, sir.

Q. You may state whether you did that in pursuance of a calculation on the subject, or simply made a lump jump at it.

A. Well, we simply did that because it was the handiest place to take it off.

Q. Had you made an estimate before as to what you thought the excavation could be done for per yard?

A. Yes; I thought 35 cents a yard was as low as it could be done with any allowance for profit.

Q. What did the cut which was made on that estimate leave it? A. 30 cents a yard.

Q. Then when you made an estimate of 35 cents a yard you thought that was as low as you could make the figures and do the work profitably? A. Yes, sir.

[404] Q. And when you put it at 30 cents a yard you put it at a figure below what you thought it could be done for at a profit?

A. Yes, sir.

Q. I have a note here which is not quite clear what you

said about Hoffman trying to get the bid increased; what bid was that, do you remember?

A. I think that related to manufacturing and laying.

Q. Whose bid, Hoffman's or McMullen's?

A. Well, I think I referred to that when they were talking about Catt's estimate. My original bid was almost the same as his, within a few thousand dollars.

Q. You mean estimate? A. Yes, sir, estimate.

Q. How close was your original estimate to Catt's all told, on the manufacture and laying of steel pipe?

A. Mine was a little over \$420,000.00, or about \$5,000 higher than Catt's estimate.

Q. You were about \$5,000.00 higher than Catt?

A. Yes, sir.

Q. And it was Catt's estimate that Hoffman wanted to raise?

A. I think that was the one that I was referring to this morning.

Q. What did Hoffman have to do or say in regard to that?

A. He said it was too low; that there was not enough money in it.

Q. He did not think it as profitable at that figure, is that it?

A. Yes, sir.

Q. And he thought if they took it at that figure they would make no money? A. Yes, sir.

405] Q. You say there was no agreement, to your knowledge, about either party withdrawing his bid on supplying the plates, or for supplying the plates?

A. No, sir, I did not say that.

Q. What was the fact in regard to that so far as your knowledge goes?

A. Well, I understood the matter to be, as I stated this morning, if the Hoffman & Bates bid on the manufacture and laying was too high and the San Francisco Bridge Company's bid on the plates was the lowest, then they would try to have McMullen withdraw his bid on the plates and substitute Hoffman's, which was about \$10,000 higher.

Q. You say that after this contract was let you were about three months getting ready for the institution of active operations. A. Well, yes, sir.

Q. What was Hoffman doing during that time?

A. Well, he was keeping after Wolff & Zwicker, because we sublet the shop work to them, and they relieved us of the work of getting the shop together, and Wolff & Zwicker were putting up their plant and getting it installed on the East Side.

Q. And Hoffman was whipping them up? A. Yes, sir.

Q. Now, what was McMullen doing during that time in connection with the matter?

A. I do not know; we had some correspondence with him.

Q. Do not you know it to be a fact that Hoffman's office here was in constant correspondence with McMullen's office, calling upon him to render aid in San Francisco in connection with the same matters that you were engaged upon here?

[406] A. Yes, sir, he corresponded with him to some extent.

Q. A very considerable extent, was it not?

A. Well, I do not know, it might be called so.

Q. Is it not a fact Mr. McMullen, to a great extent, did exert himself in San Francisco to advise Mr. Hoffman in regard to these matters, and to look out for workmen and for implements, tools, and everything of that sort needed for the work?

A. I think he did all he could, apparently.

Q. Is it not a fact that he did all that you called upon him to do? A. Yes, I think so.

Q. Was it not the agreement, Mr. Bush, that Mr. Hoffman, being the local man on the work, was to have the immediate supervision of it? A. I understood it so.

Q. From whom did you get that understanding?

A. Well, I think from Hoffman.

Q. And McMullen was not expected, was he, to come up here from San Francisco and take active control of the work, either jointly with Hoffman or singly? A. No, sir.

Q. I will ask you to state if any call was made upon McMullen at any time you were connected with the office for anything in the way of help toward the execution of this work, except in the matter of supplying money that McMullen did not respond to.

A. I should say that he responded to everything except in [407] the matter of furnishing money.

Q. McMullen furnished, or caused to be furnished, this plant at Seattle for use on the work, did he. A. Yes, sir.

Q. What other plant was furnished besides that of similar character?

A. A great deal of it was bought here in the city.

Q. What was the value of the plant that McMullen furnished in comparison with what you bought of similar character?

(Objected to as incompetent.)

A. I could only guess at that.

Q. What is your idea about it?

(Objected to as incompetent, immaterial, and irrelevant, and not cross-examination.)

A. I should say it was a very small part of what was used before the job was finished.

Q. What was it during the first summer up to the 20th of September; how did the plant furnished by McMullen correspond with the plant which was obtained elsewhere?

(Objected to as incompetent, immaterial, and irrelevant, and not cross examination.)

A. I should guess it might be one-third of the whole amount.

Q. Do you mean of the plant and material which was furnished by Hoffman, and the work which he did? McMullen furnished only about one-half of what Hoffman furnished.

A. It certainly could not have been any more than that.

408] Q. You were not taking into calculation the plant furnished by the subcontractors or anything of that sort?

A. There were no subcontractors during the first summer. I am only referring to the plant that was used in the field.

Q. You say you saw McMullen along the line of the works twice in 1893 and once in 1894? A. Yes, sir.

Q. When was it in 1893 that you saw him there?

A. I cannot say, exactly. He came out on the line with Mr. Hoffman; I am not sure whether it was once or twice. He certainly came out once.

Q. Did not you see him there at least once in the fall, along about November or December, in company with Mr. Hoffman?

A. Yes, I saw him in the fall, and I saw him the next summer.

Q. He was there after the 20th of September, 1893, was he not? A. I do not know that I could say, positively.

Q. Do you remember in September, 1893, when it was apprehended that Hoffman would run short of money for the prosecution of the work?

A. The worst time was in August.

Q. You remember when the pinch came? A. Yes, sir.

Q. Now, was it not a long time after that was all over with that McMullen and Hoffman were out on the line and worked together; was it not late in the fall or early in the winter?

A. I think it was after that time. I think that time was in August.

Q. It was after the difficulty about the money, whenever it [409] was, whether August or September?

A. Well, I cannot say, positively; I cannot recollect the exact time.

Q. Let me ask you this question; did you see Mr. McMullen in Portland at any time during the period that this question as to the contingency of money matters was under consideration?

A. I think Mr. McMullen was in San Francisco then.

Q. That was all over with before Mr. McMullen came up, then? A. Yes, I think it was.

Q. And it was after that that McMullen and Hoffman were out on the work together?

A. It was after that that I saw Mr. McMullen in Portland. I will not swear that it was after that that he was out on the line.

Q. What was McMullen doing on the line of the work when you saw him there?

A. He drove out with Mr. Hoffman.

Q. Did they go out and inspect the work?

A. Yes, sir.

Q. McMullen and Hoffman together?

A. Yes, sir.

Q. How long were they there, approximately?

A. They were out and went back the same day.

Q. Spent a good part of the day there?

A. Spent three or four hours.

Q. Now, in 1894 you say McMullen came out alone?

A. Yes, sir.

Q. Hoffman was not with him that time?

A. No, sir.

Q. You never saw him out there with Hoffman again after this time in 1893? A. I do not think so.

10] Q. Hoffman was on the line of the work very frequently, though, during 1893 and 1894?

A. Yes, sir, he came out quite often.

Q. Hoffman also had a number of other enterprises going on at the same time, did he not?

A. Well, he had some things that he gave a little time to. Used to attend directors' meetings once in a while of the Trinidad Asphalt Paving Company, and did some private business.

Q. Did not Mr. Hoffman have some bridge matters after the letting of this contract, and did you not make a number of assessments and attend several bridge lettings for Mr. Hoffman in the Northwest country?

(Objected to as immaterial, and not cross-examination.)

A. I made some estimates, and went to Tacoma with him in the winter of 1893 and 1894, when the work was shut down.

Q. When the work was shut down? A. Yes, sir.

Q. Did not Mr. Hoffman have any contracting work going on at the same time that this Bull Run pipe line was in progress of execution?

A. I do not remember anything that he had.

Q. He was not giving his exclusive time and attention to this contract, was he?

A. I think he was giving most of his time and attention to it.

Q. Most of it? A. Yes, sir.

Q. Well, what proportion would you say?

A. Well, I should say at least three-fourths of his time.

11] Q. Now, Mr. Bush, for what length of time was the work shut down in the winter of 1893 and 1894?

A. I think we shut down out at Lusted's along in January, and we started up at Grant's Butte in March—I should say about six or eight weeks.

Q. What was going on in connection with the work at that time?

A. Nothing was going on then except Mr. Foy's sub-contract work.

Q. Well, Mr. Hoffman was not engaged in superintending the work at that particular time.

A. No, sir, not at that particular time.

Q. And Mr. Hoffman was not engaged in superintending the work between the letting of the contract on the 10th of March and the commencement of the work in June?

A. I think he was then; I think he had a great deal on his mind at that time.

Q. He was preparing for the work? A. Yes, sir.

Q. Was not McMullen doing as much during that time as Hoffman was preparing for the work; I will say McMullen and persons connected with him and acting under his direction?

A. I should not suppose they were doing quite as much; they were not all at the seat of operations.

Q. Do not you know by reason of correspondence carried on with Mr. Catt in New York that Mr. Catt gave a great deal of his time during that three months to the procuring of information, estimates on machinery and things of that sort to be used on this work?

[412] A. I do not know of anything except those punches that I wrote him about.

Q. That was all that you wrote to Catt about?

A. Yes, I think in the same letter I asked him about prices of riveters.

Q. When the work was started up in March, 1894, it run continuously then until it was completed? A. Yes, sir.

Q. Mr. Hoffman went to Chicago three weeks in October, 1893? A. I think it was about that length of time.

Q. He was not engaged in superintending the work during that time? A. No, sir.

Q. What time in 1894 was the work completed?

A. The latter part of November.

Q. How long were you connected with Hoffman after that date, say the first of December?

A. Well, I was in his office, looking over extra bills and things of that sort every Sunday from that time until the first of July.

Q. He was not individually during that period superintending any work in connection with this pipe line?

A. No, sir. We had a man out fixing leaks on the line for some months.

Q. But Hoffman was not giving it his personal attention as superintendent? A. I do not know; I was not here.

Q. I am talking about the time that you were here.

[413] A. When I was here along through the month of November he was out on the line a good deal. I should have said the line was finished on the first of November, but through the month of November I was out on the line fixing leaks.

Q. What I want to get at is this: When did Mr. Hoffman's active superintendence and contribution of his time in whole or largely so towards the conduct of this work cease?

A. Well, I should say his active work might be considered to have extended up to the first of December, 1894; after that he did not have so much to do. Of course, there were a few men out there all the time during the six months that we had to keep the line in repair.

Q. Then I understand that Mr. Hoffman was continuously engaged on the work as superintendent from June, 1893, to October, when he went to the World's Fair, and then upon his return from the World's Fair in October until January, 1894, when the work was shut down, and from January, 1894, to March, when operations were resumed, and then from March until the following December?

A. Yes, that is the time when we had the most to do. From last December on several months we got telegrams almost every day about leaks on the line.

Q. It was during these periods of time that I have enumerated that Hoffman was required to give his time and attention exclusively, or very largely so in your judgment, to this work.

A. Yes, sir.

Q. Now, then, in January, 1895, was it not that Hoffman went to the Sandwich Islands?

A. Well, somewhere in the spring of 1895; I do not remember.

[414] Q. How long was he gone there?

A. I cannot tell you.

Q. As much as three months, was it not?

A. I suppose it was as much as two, I cannot say.

Q. Were you in the office all that time?

A. No, sir; not through the week. I was in the office every Sunday.

Q. Then you would know if you could recall how long he was gone, when he left and when he got back?

A. I would know if I did know; yes, sir.

Q. What is your judgment about the time he was away?

A. I should say that he was away about two months.

Q. After the first of December, 1894, what proportion of Mr. Hoffman's time was required on this contract for the manufacture and laying of steel pipe?

A. After the 1st of December, 1894?

Q. Yes.

A. Well, I cannot say the exact proportion it was, only to say that the pipe was kept in repair.

Q. He had competent men in his employ for that purpose?

A. Yes, he had competent men.

Q. Were they not men who could be relied upon to take care of leaks when they might occur? A. Yes, sir.

Q. Then it was not necessary that Mr. Hoffman should hold himself in readiness to go up over the line of pipe, or to repair the leaks, or anything of that sort personally?

A. It was not necessary for him to go personally; no, sir.

[415] Q. I understand from the first of January, 1895, the pipes were under a test with the City of Portland, were they not?

A. Well, they were under test, they had been tested several times before that.

Q. But practically the works had been turned over before that time, but they had to be watched during the six months?

A. They were telephoning quite often to Colonel Smith's office to send a man out to different points.

Q. But the work that was required of the contractors after the 1st of January, 1895, was simply to watch the pipe line to see that it did not spring leaks? A. Yes, sir.

Q. The bulk of the work had been completed and the plant turned over to the city. A. Yes, sir.

Redirect Examination.

Questions by Mr. MALLORY:

Q. Mr. Bush, do you know whether Mr. Hoffman was a man that smoked?

A. Yes, sir, he smoked sometimes.

Q. Do you know whether he was in the habit of spending some time after his meals before he went to work—did he smoke sometimes?

A. Well, after a meal he generally came into the office with a cigar in his mouth.

Q. While he was smoking he was not actually giving his attention to the superintendence of this work?

A. Sometimes he would.

416] Q. Not always? A. Not always; no, sir.

Q. Now, if you were to take out all the time he spent smoking, how much do you think you would deduct on that account from the time the work was first commenced until its conclusion, can you make an estimate of that?

A. I do not think I can.

Q. Now, Mr. Bush, is it not a fact that the entire responsibility for the conduct and management of that business was on Mr. Hoffman during the whole time?

(Question objected to as leading.)

A. Yes, sir; I think it is.

Q. From the time that he first entered upon the work until it was finally turned over to the city?

A. I think that he felt the responsibility.

Q. Now, in case of any serious break from the time the work was practically completed until the end of the six months what do you say as to the necessity of having some responsible head to look after it, and see that it was put in repair?

(Question objected to as incompetent.)

A. Well, it was necessary to have some competent man to make repairs.

Q. Is it or is it not the fact that in case of any serious break that the damage might be very large and injure Mr. Hoffman very materially? A. Yes, sir.

Q. And that would make it necessary for him to go directly onto the line, and I will ask you whether or not it was not important that some such man should be in easy reach where he could have his attention drawn to it?

(Objected to as incompetent and immaterial.)

[417] A. I think it was important that there should be somebody here to direct the work of fixing leaks.

Q. Since the question of the city's accepting the work depended upon whether the pipes proved sufficient, was it not necessary that he should have some interested man—some man like Mr. Hoffman—concerned in it, to superintend and have general control over it

A. I think it was necessary to have somebody that represented him.

Q. I understood you to say that there were three estimates, or three chief estimates, made by three different engineers?

A. Yes, sir.

Q. Now, who were those three engineers?

A. Mr. Wood, of the San Francisco office of Mr. McMullen, Mr. Catt of the New York office, and myself.

Q. Now, sir, your estimate was first upon the cost of the work, I understand; how nearly did those three estimates agree?

A. We agreed almost exactly; we agreed within \$1.00 per ton.

Q. So the want of knowledge on the part of the particular engineer, would that or would it not have been a material element in the figuring?

A. Want of knowledge?

Q. The want of knowledge of the construction of the country, and the particular character of the ground, etc., was that essential in making the figures, or would the figures based upon the estimate made by the water committee indicate the kind of work that they had to have done?

[418] (Objected to as immaterial and incompetent.)

A. I think that want of knowledge of the precise location would only affect the result of the engineer's calculations to a small extent.

Q. Now, let me ask you if the water committee furnished any data of the amount and kind of work that they wanted done?

A. They furnished an estimate on which the engineer's were based of the quantities of each item.

Q. And it was upon that estimate that the engineer made his figures?

A. Yes, sir; the engineer just simply added his price to those figures.

Q. He made his estimate of the cost of doing the work that was specified in the water committee's invitation for bids?

A. Yes, sir.

Q. So that Mr. Catt's want of any actual knowledge of the situation, and Mr. Wood's actual want of knowledge of the situation and of the character of the material to be handled from an inspection of it, yet their bids and yours for the cost of the work were identical, were they? A. Yes, sir.

Q. Now, when Mr. McMullen came in in a somewhat excited state of mind about an hour before the bids were submitted and insisted upon the bids being reduced, what reason did he give, if any?

A. Well, that he had sized up some of the other bids.

Q. Did he say whose? A. Yes, Mr. Wakefield's.

Q. What did he say?

A. He said, "We have to come down or we won't get the job."

Q. That is the reason why it was reduced,

[419] A. Yes, sir.

Q. Now, the total estimate of the cost and profit made by yourself and by Mr. Catt only differed about \$5,000.00, I understand? A. Yes, sir.

Q. Now, how did you come to get this \$465,000, or \$479,000, that you finally agreed upon?

A. Well, that was got by adding about \$10 per ton to the first item in the bid,—that is so much per ton—so many pounds of plates and rivets, raised that from 2½ cents per pound to 2¾ cents per pound.

Q. Was that in the way of cost or profit?

A. That was in the way of profit.

Q. In figuring when you had ascertained the cost it did not require any very nice figuring to determine the amount of profit?

A. Well, it was not a question of figuring; it was a question of judgment.

Q. You came to the conclusion that by reducing the amount about \$13,000 you could get below Wakefield?

A. Yes, sir.

Q. So you reduced your amount \$13,000 by taking that amount off the excavating? A. Yes, sir.

Q. That reduced the cost of excavating really 5 cents below what you thought it could be done for?

A. Below what I thought it ought to bring.

Q. Below what you thought it ought to be done for?

A. Yes, sir.

Q. Now, this difference referred to in Mr. Catt's bid in regard to manholes—his bid was \$7,560 and your bid was \$4,500—I will ask you whether you made your estimate before you had seen Catt's estimate or afterwards?

[420] A. It was before.

Q. How was it with the concrete? There was \$700.00 on the items of concrete in Catt's estimate and yours was \$600.00. Was your estimate on that item made before or after you saw Catt's?

A. I think all the items I had made before I saw Mr. Catt's estimate except the one for bricks laid in cement—that item I put down just as Mr. Hoffman gave it to me.

Q. Your estimate for excavating was more than Mr. Catt's originally? A. A trifle more; yes, sir.

Q. Some \$4,500 more? A. Yes, sir.

Q. Now, do you recollect at that time, Mr. Bush, any matter that was communicated to you, either by Mr. McMullen or Mr. Hoffman, as having been received after this bid or this estimate of yours was made which induced you to change your figures in any respect?

(Objected to as immaterial and incompetent.)

A. No, sir.

Q. Your attention has been called to some letters here—a letter of February 22d, 1893—does that letter refer to the manufacture and laying of the pipes, or does it refer to the steel plates? There is a reference in the letter to valves, \$25 for freight and \$25 for laying.

A. Well, those valves we got from Goldsmith & Lowenberg, so we did not pay any attention to that particular item.

Q. I was going to ask you whether those valves, the cost of freight and the cost of laying, had anything to do with the making up the bid as finally put in by Hoffman & Bates?

A. No, sir.

21] Q. If Mr. Lockwood did any figuring on this matter at all, to what part of the work was his figuring directed?

A. I do not think Mr. Lockwood did any figuring to amount to anything. He simply filled out Mr. McMullen's bid.

Q. Now where was he when he filled out that bid?

A. In Mr. Hoffman's office.

Q. How were the figures on that bid arranged and by whom?

(Objected to as not proper re-direct examination.)

A. Well, the figures in Mr. McMullen's bid for manufacturing and laying were not particularly agreed upon by anybody. It was agreed that it should be a high bid, and it was simply filled in to make it high. It was not agreed upon to be any particular amount.

Q. Well, the other items for steel plates and bridges?

(Objected to as incompetent, immaterial and irrelevant, and not proper re-direct examination.)

A. The steel plates that was agreed upon.

Q. That was to be lower?

(Objected to as incompetent, immaterial and irrelevant, and not proper redirect examination.)

A. It was to be lower than Mr. Hoffman's bid.

Q. That was agreed upon between Mr. Hoffman and Mr. McMullen?

A. Yes, sir.

Q. Do you remember about the other items of bridges and head works?

(Objected to as incompetent, immaterial and irrelevant, and not proper redirect examination.)

422] A. It was agreed that the San Francisco Bridge Company's bid on bridges should be lower. The other things did not amount to so very much.

Q. After Mr. McMullen came here from San Francisco, and between the time of his arrival here and the time the bid which was agreed upon between him and Mr. Hoffman was submitted to the water committee, were you in receipt of any information requiring a change of any sort in the estimates upon which that bid was based?

A. No, sir; they were not in receipt of anything that required any change. Mr. McMullen brought his telegrams in to me, but I did not see anything that made any particular change necessary.

Q. Now, were any changes made on account of any such information that you know of?

A. Nothing that I know of.

Q. If any such change had been made you would have known it? A. Yes, sir.

Q. You had charge of the preparation of the bid itself, had you not?

A. Yes, sir; I did all the figuring on the bid itself.

Q. And it was filled out by you? A. Yes, sir.

Q. And you were consulted about it when any change was made? A. Yes, sir.

Q. Now, I understand you to say that since a reduction of the total of the estimate was to be made from the amount of profits that it did not require any nice calculation to determine how it should be done, or how the deduction should be made? A. No, sir.

Q. Did Mr. McMullen indicate when he came in, as you spoke of, how much reduction must be made?

[423] A. I think he indicated we were to make about the amount we did make.

Q. Did he suggest anything from what particular item in the bid it could be taken from, or was that left to your judgment?

A. As I remember it, they asked me where was the easiest place to take it off, and I took it off the earth work.

Q. During the time between the letting of the contract by the city to Hoffman and the beginning of the work on the line in June, what was Mr. Hoffman doing?

A. Well, he was principally punching up Wolff & Zwicker to get the shop ready, and punching me up to get tools ready here in town.

Q. Was he giving his whole attention to it or not?

A. Well, he was giving a good deal of his attention to it.

Q. As much attention as a person having it in charge could do? A. Yes, sir.

Q. What was Mr. Hoffman doing, if you know, during the time the work shut down from January to March?

A. Well, that is the time he and I went over to Tacoma.

Q. How long were you gone?

A. A couple of days at a time.

Recross-Examination.

Questions by Mr. L. B. COX:

Q. Did Mr. Hoffman charge up against this work the cigars that counsel has called your attention to his smoking?

424] A. Not that I know of.

Q. Do you know any other bad habits that Mr. Hoffman had?

A. Well, I do not know about any bad habits.

Q. How much of his time was given to habits that you would not approve of during the time that this work was going on?

A. Oh, well, I will say that he had no habits that I would not approve of.

Q. You say, Mr. Bush, that after this work had been practically completed and turned over to the city, and while it was under this six months' probation to determine the condition in regard to the pipes as to leaks and breaks, it was necessary to have some competent man present to exercise superintendence over the work? A. Yes, sir.

Q. And it was during that time that Mr. Hoffman went off to the Sandwich Islands and left it? A. Yes, sir.

Q. Had he the services of a man competent to discharge work of that character?

(Question objected to as incompetent, immaterial and irrelevant, and not proper recross-examination.)

A. Well, I think he paid a man \$150.00 a month. The man was in the field.

Q. Now, there was no difference in the condition of things, was there, during so much of the six months as Mr. Hoffman was in the Sandwich Islands and the remainder of the six months?

A. Well, at the time Mr. Hoffman went to the Sandwich
[425] Islands he had reason to believe the leaks were pretty well fixed.

Q. Was there any difference in the condition of the pipe in regard to putting it under the charge of some other person during those two months than there was during the other four months?

A. I think there was some difference in the two months preceding that. I think in the months of December and Janu-

ary—December particularly—there was a good deal to see to. It was after that that Mr. Hoffman went away, but after that I do not think there so much.

Q. Now, then, if Mr. Hoffman could leave the pipe and go to the Sandwich Islands as he did do for two months, could he not have done the same thing and put it in charge of some man whose services might have been procured for \$150.00 a month, and who would have been competent to look out for the pipe during the whole of the six months after the first of January?

(Objected to as incompetent, irrelevant and immaterial, and not recross-examination.)

A. I think it was important for Mr. Hoffman to be here at the first of the time and near the close of the time, near the time of the acceptance of the work by the city.

Q. That is, the first of July. A. Yes, sir.

Q. But it was not important other times?

Mr. MALLORY. He did not say that.

A. It was not of so much importance other times?

Q. Now, Mr. Bush, you say that such differences in conditions as might have actually existed here, and as they were [426] presented to a man situated as Mr. Catt was in making an estimate on this work, would have made slight changes in the result?

A. Well, what I would say is this: That both Mr. Catt and Mr. Wood were pretty familiar with this country and they knew pretty well what the conditions really were, and they had to make a pretty close estimate on that account.

Q. Now, I refer to the conditions as they appeared to Mr. Catt, whatever his information may have been?

A. Well, his information was a great deal more accurate than if he had never lived down here, because Mr. Catt has lived here.

Q. Where did Mr. Catt live?

A. He lived in Seattle.

Q. Do you know of any single time that Mr. Catt was ever in the city of Portland?

A. Well, he was not in Portland when I was here.

Q. He was in Seattle when you were here?

A. No, sir.

Q. How do you know he was in Seattle?

A. I have heard people speak of his being there.

Q. How long did you understand that he lived in Seattle?

A. Several years.

Q. What was he doing?

A. Representing the San Francisco Bridge Company in that district.

Q. Now, is it not a fact that when this work was actually commenced it was found that even you, who had been over the ground, had not been very well advised as to the conditions as they subsequently turned out?

A. About the soil?

27] Q. Yes, particularly.

A. Yes, we found the excavation much harder than we expected.

Q. You say that the estimates made by yourself and Mr. Wood and Mr. Catt were practically identical; was not that only on the cost of manufacturing the pipe?

A. Yes.

Q. And not on the other matters?

A. No, sir; not on the other matters.

Q. You say that these differences between the Catt estimate and your estimate you have referred to existed before you saw Catt's estimate; that is, your figures were made up independent of his? A. Yes, sir.

Q. I understood you to say in your cross-examination in the first place that you took Catt's figures and changed them so that they appeared in contrast with the figures that you had sent down?

A. I think I did not say that.

Q. If you did say it you did not intend to be understood that way?

A. I did not intend to be understood that way; no, sir.

Q. Are those figures which you have scheduled on this paper in contrast with Catt's figures, the figures that you had made up before you ever saw Catt's estimate?

A. For the minor items, they are.

Q. How are they for the larger items?

A. For the one large item the price was raised \$10.00 per ton over my original price.

Q. And the item you cut was the earth excavation?

A. Yes, sir.

[428] Q. Do you say that the other were figures that you had got before you ever saw anything that Catt had made?

A. I think they were. I think we looked up these things and got a price on all the valves and things of that sort. I know that my figure for the bends was made up before I saw his.

Q. You figure on the bends? A. Yes, sir.

Q. And your figure was widely out of the way in regard to bends—you found a great many more bends than you calculated?

A. I reported that fact when I came back over the line.

Q. You found a great many more bends than you estimated?

A. Yes, sir; Mr. Smith thought there would be 200 of those bends; I think I estimated about 1,000, and the actual number was 730.

Q. You say that nothing reached you in the way of information during the time you were figuring on these estimates affecting in any degree the calculations that you were making, is that the fact?

A. Yes, sir; I think that is the fact.

Q. What is the significance of these figures which you say were made on this telegram addressed to McMullen by Catt, which was marked, "For identification No. 4"?

A. Those figures are hundredths cents per pound, but they referred to having the plates punched, planed and scarfed back east, but we paid no attention to that because we decided to do all the work here.

Q. Did not you make use of those figures in determining whether you had best do the work back there or here?

[429] A. No, sir, we gave up all idea of doing the work east.

Q. Before you made that? A. Yes.

Q. Notwithstanding that you took the trouble to carry out that estimate to see what it amounted to?

A. Yes, I took the trouble to compare it with the estimate that I had some time before from other parties.

[Signed]

HARRY D. BUSH.

Thereupon the taking of testimony herein is adjourned until January 23rd, 1896, at 10 o'clock A. M.

[Signed]

GEO. A. BRODIE.

Office of G. A. Brodie, U. S. Examiner, Portland, Oregon,
January 23, 1896, 10 O'clock, A. M.

At this time appear the parties herein, the complainant appearing by Mr. L. B. Cox, of counsel, and the defendant appearing by Mr. Rufus Mallory, of counsel, and thereupon the following proceedings are had, to wit:

H. C. CAMPBELL is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by MR. MALLORY:

Q. Mr. Campbell, state your name, age, residence, and
430] occupation?

A. H. C. Campbell; age, 41 years; residence, Portland, Oregon; manager of the City & Suburban Railway Company.

Q. Are you interested in the Pacific Bridge Company?

A. Yes, sir.

Q. What business is that company engaged in?

A. General contracting.

Q. How long have you been engaged in the business of general contractor, in connection with the Pacific Bridge Company?

A. I came here in 1886, and I have been with them since 1886.

Q. You say you are manager of the City & Suburban Railway Co.—did you, during the time that you have been such manager, have anything to do with the contracting business connected with the Pacific Bridge Company?

A. Yes, we kept both concerns together.

Q. Did you know Lee Hoffman in his lifetime?

A. Yes, sir.

Q. Are you acquainted with Mr. McMullen?

A. Yes, sir.

Q. Were you acquainted with the circumstance of the letting of the work of constructing the pipe line for conveying water from Bull Run to Portland?

A. Well, to a certain extent I am.

Q. Ever been over the line? A. Not wholly.

Q. Were you a bidder for any part of the work at the time of the letting by the water committee?

(Objected to as irrelevant.)

A. Yes, sir.

[431] Q. Were you acquainted with the nature and character of the work to be done in the matter of manufacturing and laying the pipe from Bull Run to Mount Tabor?

(Same objection.)

A. Yes, sir.

Q. Did you know of the contract having been let to Hoffman & Bates? A. Yes, sir.

Q. Are you acquainted with the business that one would be required to perform who had that contract—what the work of superintending and managing—do you know what it would be worth?

A. Well, I think so, Mr. Mallory.

Q. Supposing a man having that contract amounting to some \$46,500.00, having to execute a bond for its performance to the amount of \$140,000.00, required to furnish money for a plant to carry on the work, amounting to \$15,000.00, or \$20,000.00, had to provide the means for carrying on the work in the way of tools, and the best plan for conducting it, and having general superintendence of it—what do you say it would be worth per month for a man to do that sort of business?

(Counsel for the complainant objects to the question on the ground that it assumes an incomplete state of facts as shown by the evidence.)

A. Well, it would be a very valuable position, and responsible one, to find a man to take hold of it and do it; should think it would be a liberal salary.

Q. How much?

A. It would be a very liberal salary for a man to take that responsibility.

[432] Q. What sum would you say would be a reasonable salary for that work?

A. I should think that a man ought to have one thousand or twelve hundred a month.

Q. Mr. Campbell, in the conduct of such business as that, is it expected or usual that the superintendent will apply every hour of his time directly to the work?

(Objected to as incompetent.)

A. Well, do you mean to be out on the work?

Q. Yes, sir.

A. Well, not in a business of that kind.

Q. What is the chief value of the services of a man in such a position?

A. Well, to plan the work, and see that it is carried out, to secure good men to work in the different departments, and to look out for the financial end of it.

Q. Where the party himself furnishes a large share of the money to start the work, which requires, say, \$15,000.00, would that enhance the value of his services at all?

(Counsel for complainant objects to the question on the ground that it is based upon an incomplete statement of the facts.)

A. It most assuredly would.

Q. Do you know anything of Mr. Hoffman having gone to the Sandwich Islands in 1895?

A. Yes, sir.

Q. Do you know when he went there?

A. Yes, sir. I went over there, left San Francisco on the 9th of February; we were to sail on the 7th, but the ship was two days late in leaving, and I arrived in Honolulu seven days after that, and Mr. Hoffman and wife came in two days after I arrived.

Q. You arrived on the 9th?

33] A. No, I left San Francisco on the 9th, and arrived in Honolulu on the 16th, and Mr. Hoffman and his wife came in two days later.

Q. They came in on the 18th, then? A. Yes, sir.

Q. Do you know how long he remained there?

A. Well, about two months; I was there five weeks, and he was there two or three weeks longer.

Q. Do you mean he was there five weeks, or how long was he gone from Portland?

A. I arrived in Portland on the first of April, I think, and he came back about the middle of April; I think he was probably two weeks behind me, may be three, but not over that?

Q. Did you ever have any conversation with Mr. McMullen in regard to the letting of this contract for the manufacture and laying of the pipe from Bull Run to Mount Tabor?

A. No, sir; Mr. Hoffman and I never discussed the matter. I don't remember of our discussing it at all.

Q. I will ask you if you ever had any conversation with Mr. Hoffman about it?

A. Yes, I have often talked with Hoffman about it.

Q. When was the last conversation that you had with him?

A. The last conversation I had with Hoffman was when we were in Honolulu.

Q. Would you state what that conversation was?

(Objected to as incompetent.)

A. I asked Lee—

Q. Who do you mean by "Lee"?

[434] A. Mr. Hoffman; we always called him Lee; I asked him what Mac. was going to do—I always spoke of Mr. McMullen as Mac.—and Mr. Hoffman said, "I suppose he will sue me"; I said, "Suppose he does," and Lee says, "Well, if he does, I am afraid it will bring out the fact that we pooled that job." I said, "I don't see as you need to take that very seriously"; I said all our merchants and bankers do that kind of business—that business is transacted by pools and trusts—and Lee said he did not care for that, it would show that there was collusion, and it was against public policy, and he said he was afraid he had some neighbors who would not understand that kind of transaction; always talked about that particular point of the case; and I was trying to cheer him up, and he made that remark to me in regard to the matter.

Q. Did he at that time, or not, give you any details of how the matter was arranged between them, or did he speak about it only generally?

(Same objection.)

A. No, he did not go into details.

Q. When you speak of "Lee" and "Mac," to whom do you refer?

A. I refer to Mr. Hoffman and Mr. McMullen.

Q. Plaintiff and defendant in this suit?

A. Yes, sir.

Q. When he was talking to you about the manner in which that contract was obtained, what contract did he refer to?

(Same objection.)

A. The contract for the Bull Run water pipe.

Q. For the manufacture and laying of the pipe?

(Same objection.)

435] A. Yes, sir.

Q. The contract that he had with the city?

(Same objection.)

A. The contract which he had and carried out.

Cross-Examination.

Questions by MR. L. B. COX:

Q. Mr. Campbell, you say on the hypothesis which was submitted to you by counsel for defendant you think a proper salary for a superintendent of the work which was done in manufacturing and laying the steel pipe on this water line would be a thousand or twelve hundred dollars per month; now, I will ask you this question: Suppose that on the 6th day of March, 1893, Hoffman & McMullen went into partnership to manufacture and lay the pipe from the head works on Bull Run to Mount Tabor, and that it was agreed that Hoffman should be the active superintendent; that both men were to contribute equally to what was needed in the way of capital and material to carry on the work; that each was to contribute his services in his sphere—Hoffman here, McMullen in San Francisco—and the work was not to commence until June following; that McMullen in San Francisco, was engaged whenever he was called upon between the 6th of March and the 20th of September, 1893, in assisting at his end of the line, and through the New York office of the San Francisco Bridge Company which he controlled, in getting ready for the work and prosecuting it, after it was started by procuring information in regard to the best manner of conducting the work by looking up and supplying men in the position of superintendent and in minor positions, getting such tools as McMullen was called upon to look after and secure for the work; that he contributed plant and material to the value of between \$1,700 and \$2,800, being about one-third of the total amount which was provided during that time; that he did not supply any money beyond that; that Hoffman made advances to the enterprise between June and September aggregating some \$15,000, all of which was returned to him on the 20th of September, and he thereafter had no further money in the enterprise; that Hoffman giving his personal attention to the work as had been agreed upon between him and McMullen during the months which I have alluded

[436]

to from March until September 20th to the full extent that his personal attention was required, but that he was also engaged during the same time in carrying forward his individual business outside of this contract; that he and McMullen were partners in — what, then, would you say, under those circumstances, would be a proper allowance to be made Hoffman for the work he was doing as against the work which McMullen was doing—for Hoffman's services to be charged against the job? I will say also that Hoffman got the bond which he was required to give, that should be added to my question.

(Counsel for defendant objects to the question, for the reason that it is not a correct assumption of the facts proven in the case.)

[437] A. Knowing all these circumstances quite thoroughly I considered it upon the basis that if I was a partner of Mr. Hoffman, and he done the work he did do, I would not have regarded \$1,500 a month as too much of a salary to pay him.

Q. You think \$1,500 a month during the months that I called your attention to?

A. No, from the time this work was started.

Q. Please answer my question, directing your attention to the time between the 6th of March and the 20th of September, 1893, the first year; I will ask your opinion based upon the facts I have submitted to you.

A. Well, there was a great deal of work to be done that was the responsible part of it.

Q. What was your judgment based upon the facts during that time?

A. I think he should be well paid, Mr. Cox, for his services.

Q. What would you say?

A. I would not begrudge a thousand dollars a month, I am sure.

Q. Suppose McMullen had done nothing during that time, what would have been a reasonable compensation to Hoffman if he had done everything?

A. I have not a very great appreciation of the services of Mr. McMullen on this job.

Q. You are not called upon, Mr. Campbell, to give an opinion upon the basis of your opinion, but from the facts as stated to you.

A. Mr. McMullen should be paid for what he did, no matter what it amounted to. If he furnished \$1,800 of machinery for
[438] such a plant as that, he ought to be paid; he ought to be paid for such service as that what it would be worth.

Q. Is it not a fact that the estimate you have given upon the value of Mr. McMullen's services is based upon your own idea of what each man did?

A. On my own idea?

Q. Yes.

A. It would be based on my opinion of what they did, yes.

Q. Now, is it not a fact that you are making that allowance to Mr. Hoffman on the assumption that Mr. McMullen threw on Mr. Hoffman the burden of carrying the whole thing through, and rendered him no aid?

A. Well, that is the way I look at it; very little aid was rendered.

Q. Now, then, if it be a fact that during the period of time between the 6th of March and the 20th of September, 1893, the first year that this work was set on foot, Mr. McMullen did everything that he was required to do, both individually and through certain employees of the San Francisco Bridge Company, at San Francisco, whose services were directed at the instance of McMullen, and also other like persons in the city of New York—did everything that he was required to do, or was called upon to do, up to the 20th of September, and at that time the only grievance made against him was that he had not furnished as much money toward the job as Hoffman had furnished, and Hoffman used that as a means of attempting to exclude McMullen from the partnership at that time, and assumed to take it upon himself after that time to run it to its
[439] conclusion—what would you say was the reasonable compensation to be allowed Hoffman for the entire time that he had the job in hand over and above what McMullen had done and was willing to do?

A. Well, Mr. Hoffman had full management of it, but don't know what McMullen did; you say he did services in New York?

Q. The fact is, Mr. Campbell, you are rendering your opinion on what you know or believe that Hoffman did without any information as to what McMullen did as an offset to Hoffman's attending to the work?

A. I think Mr. Hoffman was worth that much anyhow, whatever McMullen did; think McMullen could well afford to pay him that much regardless of anything that McMullen may have done.

Q. Regardless of anything McMullen may have done?

A. Yes, sir.

Q. Now, what you know about this matter, Mr. Campbell, is what you have learned from Hoffman, is it not?

A. A good deal of knowledge comes from him; yes, sir.

Q. What do you know about it at all as to what McMullen did and what Hoffman did, except what Hoffman told you?

A. I saw the work that was being carried on.

Q. Saw Hoffman as active superintendent?

A. I have been out that way over the work two or three times, and I know how the work was carried on, to a certain extent. I am quite well posted.

Q. But your knowledge as to what McMullen did, or what he did not do, you gathered from Hoffman?

A. You might say that; there would be no other way to gather it.

[440] Q. Mr. Hoffman talked with you frequently about this matter, did not he? A. Yes, sir.

Q. Gave you his side of the grievance between himself and McMullen? A. Yes, sir.

Q. And you formed an opinion in regard to these topics concerning which you have been giving testimony from this information communicated to you by Hoffman?

A. Principally.

Q. You and Mr. Hoffman were very close friends, were you not? A. Always very good friends.

Q. And he communicated very freely with you in regard to this matter?

A. We have often talked it over; yes, sir.

Q. Mr. Hoffman, when he went to Honolulu, was engaged in business enterprises of his own, was he not, at Honolulu?

A. No, sir, he had no business at Honolulu except a pleasure trip.

Q. Was not Hoffman figuring over there in regard to some railway scheme?

A. No, sir, he knew nothing about it; he was there; there

was a railway scheme, but Mr. Hoffman knew nothing about it when he landed.

Q. Did he take any interest in it?

A. Took no personal interest in it.

Q. Had nothing to do with it?

A. None whatever, he looked the matter over, did not want to engage in any business any further; he was in position to have done so and made a good thing out of it, but he desired to [441] take it easy for some time, and declined to take an interest in it; he was there purely on pleasure.

Redirect-Examination.

Questions by MR. R. MALLORY:

Q. Mr. Campbell, I will just ask you a question; suppose Mr. Hoffman to be on the ground and in charge of this work, now suppose that Mr. McMullen at the instance of Mr. Hoffman had caused to be ordered a hydraulic punch and shears in New York, and suppose he had recommended to Mr. Hoffman a foreman or superintendent for the work, and suppose he had, at the request of Mr. Hoffman, ordered in San Francisco some portable forges; now, how much would that kind of service on the part of McMullen, in your opinion, reduce the value of Mr. Hoffman's services as general superintendent and manager and having control and being responsible for this work?

(Counsel for complainant objects to the question, on the ground that it is not rebutting testimony, and on the further ground that it is based upon an incomplete statement of the facts.)

A. Well, that would be acting in the capacity of a purchasing agent, and his compensation would be a small commission on the amount of the purchase price of the goods.

Q. Just answer the question whether it would in any way reduce the value of Mr. Hoffman's services as manager.

(Same objection.)

A. Not at all.

Witness excused.

[442] A. DONNELL is called as a witness for the defendant, and having heretofore been duly sworn, testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. Mr. Donnell, I show you a paper marked in red ink at the top "Copy of San Francisco Bridge Co. 8, estimate"; then in the line below in black ink, "Portland Water Works, Bid A," and also a sheet marked "Copy from San Francisco Br. Co., Estimate," in red ink; then in black ink, "Portland Water Works, Bid C Continued"; I show you both sheets and ask you to state, if you know, what they are and if you have seen them before.

A. I have seen them before.

Q. Did you ever see the originals before?

A. Yes, sir.

Q. Do you know how they came into your possession, if they ever were in your possession or under your control?

A. Well, I do not know as they were exactly in my possession; they were handed to me to be copied.

Q. Do you know by whom?

A. I cannot remember just now.

Q. How, if you know, did the originals of those papers come into your office?

A. How they came to the office in the first I am unable to state.

[443] Q. I will ask you if you know of their being at any time in the possession of Mr. McMullen? A. Yes, sir.

Q. When and where?

A. Well, I do not remember the particular date. It was about March, 1893.

Q. Before or after the letting of the contract to construct and lay the pipes to convey Bull Run water to Mount Tabor?

A. Before.

Q. How long before?

A. I cannot say—some weeks, one or more weeks.

Q. When did you first see them, if you remember?

A. About the same time—about March, 1893.

Q. That you first saw them?

A. Yes, sir; I first saw them about that time.

Q. Do you know whether or not Mr. McMullen about that time brought any papers to the office?

A. No, I do not know.

Q. You do not know? A. I do not know positively.

Q. Did you see any of those papers?

A. Any of these papers—the originals?

Q. Yes. A. Yes, I saw them.

Q. Now, had you any conversation with Mr. McMullen about his having brought these papers with him from San Francisco—the originals of those papers?

A. None that I remember of.

Q. I will ask you now if you still have in your possession the original from which that was copied?

A. No, I have not.

Q. State what was done with it, if you know.

A. It was either taken back or sent back to San Francisco to the office of the San Francisco Bridge Company.

[444] Q. It was taken back by whom?

A. By Mr. McMullen.

Q. I will ask you now if you made this copy yourself?

A. Yes, sir, I made it.

Q. This is a copy of the original that you were furnished in your office purporting to be the estimate of the San Francisco Bridge Co.?

A. Well, barring any errors—yes.

Q. How is that?

A. Well, barring any errors there might be.

Q. Well, do you know of any errors?

A. None that I know of.

Q. Your intention was to copy it correctly, was it not?

A. Yes, sir.

Q. What is your present recollection as to whether you copied it correctly or not?

A. Well, I think I checked it.

Q. And if you checked it you compared it?

A. I must have compared it and found it correct before I delivered it.

Q. Did you have anything to do with the making of the estimates or preparing the bids for the work of constructing the waterworks for bringing Bull Run water to Portland in the office of Mr. Hoffman—in the work of preparing the bids in the office?

A. Yes, sir.

Q. What did you have to do?

A. I helped make the final copies of them to be presented to the water committee.

Q. Did you or not have anything to do with the figuring—with the calculation—was that part of your duty, or was that done by the engineer?

[445] A. I did a small portion of it in the matter of checking calculations, additions, etc.

Q. Simply formal mathematical works, figuring and that sort? A. Yes, sir.

Q. Did you hear any conversation between Mr. Hoffman and Mr. McMullen about the bids?

A. Well, I heard them talking in a general way about it at various times.

Q. Is there anything that you specifically remember about it at this time—about the method of bidding or anything of that kind? A. No, nothing.

Q. Simply heard general talk about it?

A. Just general talk.

(Counsel for defendant offers in evidence the papers last shown the witness, but states that as they were not offered when Mr. Bush was on the stand he will call Mr. Bush if they are objected to on that ground. Counsel for complainant makes no objection to the offer of the papers because not offered when Mr. Bush was on the stand, but objects to their introduction on the ground that they are immaterial, and because no proper foundation has been laid for their introduction as copies in lieu of the originals. The papers referred to are received and filed, marked "Defendant's Exhibit U2, V2, W2, W2, page 2, and W2, page 3.")

[446] *Mr. Mallory.* I will identify the second paper consisting of three sheets more fully; it is marked "Bull Run, Copy of Catt's Estimate on Plant," signed at the bottom with the initials "H. D. B.," this is the paper marked "Exhibit W2" above. The second sheet is marked "Bull Run," with the initials "H. D. B." at the bottom; this paper is marked "Exhibit W2, page 2" above, and the third sheet is marked "Copy of Catt's Estimate for Manufacturing and Laying," and is the paper marked "Defendant's Exhibit W2, page 3," above. I offer these papers in evidence, reserving the right to explain the pencil figuring on the last sheet.

Q. Up to what time, if you know, did Mr. Hoffman make a charge as salary as superintendent of this work?

A. Up to January 1st, 1895.

Q. Do you know when Mr. Hoffman went to the Sandwich Islands? A. Yes, sir.

Q. When did he go?

A. He left Portland on February 9, 1895.

Q. And returned when? A. About April 3rd.

Q. Gone a little less than two months?

A. About two months I think he was gone.

Q. Do you know about his having visited Yellowstone Park? A. Yes, sir.

Q. When was that?

A. He left Portland on the 24th of June, 1895.

Q. Was gone about how long, do you know?

A. About two weeks.

Q. Did he return before the 1st of July, or do you remember?

A. I do not remember; I do not think he did.

Q. Upon what day was it that Mr. Hoffman was killed?

A. On July 21, 1895.

Q. Was it Sunday? A. Yes, sir, Sunday.

Q. What do you know about Mr. Hoffman having gone to Chicago in 1893.

[447] A. Yes, I think he went to Chicago in 1893—the latter part of 1893.

Q. How long was he gone, do you know?

A. He was gone about two weeks.

Q. I will ask you if you know anything about his making any arrangement about funds to meet payments which would fall due about the 20th of September, 1893?

(Objected to as immaterial and question withdrawn.)

Q. I will ask you another question: What do you know, if anything, about Mr. Hoffman calling upon Mr. McMullen for funds about the middle of August, 1893, or September?

(Objected to as incompetent and immaterial.)

A. Yes, I know, Judge.

Q. I will ask you whether you have any knowledge of his having made any arrangement for providing the money in case Mr. McMullen did not advance the money as requested?

(Same objection.)

A. I do not know about any special arrangements.

Q. Do you know Mr. Hugh Foy? A. Yes, sir.

Q. In what capacity, if at all, was he employed about the works for the execution of the contract with the city?

A. He was employed as superintendent in the field of all work under Mr. Hoffman's contract.

Q. About when did he commence and about when did he cease?

A. He commenced work about June 1st, 1893, and ceased work about the end of the year—about the end of that same year.

[448] Q. About the first of January?

A. Yes, I think so—about the latter part of 1893, some time.

Q. What do you know about his having had a contract from Mr. Hoffman to do some work of excavating on this ditch line?

A. He had a subcontract from Mr. Hoffman for excavating certain portions of the work.

Q. When he was performing that contract he had ceased to be superintendent of the work, had he not?

A. Yes, sir.

Q. What do you know about a plant that was brought over from Seattle—sent over by the San Francisco Bridge Co.? Explain what you know about that.

A. Well, there was quite a bit of plant shipped over to Portland from Seattle by the San Francisco Bridge Co., and charged it to Hoffman & Bates, consisting of wheel scrapers and various other tools; also a number of horses that was sent over for them to be used on the Bull Run pipe line.

Q. What, if anything, was said, if you know, between Hoffman and McMullen about the price of the plant; what should be allowed for it?

A. I do not know that there was anything said until after the plant had been shipped here—

(Complainant objects to this testimony as immaterial and incompetent.)

A. (Continued.) After the plant was shipped here a bill was received at the office. Mr. Hoffman thought it somewhat exorbitant for the sort of material that it consisted of, and wrote either to the San Francisco Bridge Co. at Seattle or to

9] Mr. McMullen at San Francisco, and shortly after that Mr. McMullen wrote and told Mr. Hoffman—

(Counsel for complainant objects to the witness stating contents of these letters as not the best evidence.)

Q. Go on.

A. That whatever price suited him would be agreeable to both sides.

Q. Whatever suited Hoffman would be agreeable to McMullen? A. Yes, sir.

Q. Have you any recollection what that price was?

A. Yes, sir; it was about \$2,300.00.

Q. Was the item carried into the books of Hoffman & Bates?

A. Yes, sir; it was credited to the San Francisco Bridge Co. on the books.

Q. It will be found there?

A. Yes, sir; it is found on the books.

Q. What, if anything, do you know of Hoffman & Bates offering to pay the San Francisco Bridge Co. for the plant?

(Objected to as immaterial.)

A. Yes, there was a remittance made to cover the account.

Q. Was it accepted or returned?

(Same objection and as incompetent.)

A. It was in the form of a draft which was returned.

Q. Not accepted? A. Not accepted.

450]

Cross-Examination.

Questions by MR. L. B. COX:

Q. Mr. Donnell, do you remember the circumstance of a breach occurring between Mr. Hoffman and Mr. McMullen in September, 1893, on account of McMullen not furnishing Hoffman with certain moneys that he demanded of him?

A. Well, I remember a breach occurring, but I do not remember the particular time or in what month it did occur.

Q. Now, was it not after this time that this tender for the plant was made to the San Francisco Bridge Co.?

A. Well, as I do not remember just the time the breach occurred I cannot say.

Q. Assuming that it was in September, 1893, what would you say?

A. Yes, it was after that time.

Q. It was considerably after that, was it not?

A. I think so.

Q. Do you remember what the value of the plant was that had been contributed by Mr. Hoffman prior to September 20th, 1893, in comparison with that which had been contributed by McMullen?

(Objected to as irrelevant and immaterial.)

A. I do not know how it compared at that time.

Q. Can you remember whether it was materially larger?

(Same objection.)

A. Do you mean at that time or on the whole work?

[451] Q. No, I mean prior to September 20th, 1893.

A. No, sir; I do not remember how it compared at that time.

Q. The books will show that, will they not?

A. Yes, the books will show that.

Q. Do you remember the fact of the work being shut down during the winter of 1893-4? A. Yes, sir.

Q. What length of time were they shut down?

A. Well, it was never entirely shut down. The bulk of the work was shut down. The amount of the work was reduced, it was never entirely shut down.

Q. It was very largely reduced, was it not?

A. Yes, sir.

Q. Practically shut down in comparison with the entire job? A. Well, yes, you might say so.

Q. Do you remember that in April, 1894, the estimate allowed Mr. Hoffman was less than \$300.00?

A. No, I do not remember.

Q. Now, what was the character of the work which was going on during that time—the small amount which was going on?

A. Well, it was similar to the general work, only on a smaller scale.

Q. Was not it principally in the matter of taking care of the general work—watching it so that it would not be injured by the winter water, floods, freshets, slides, and things of that sort?

A. I do not think that that entered into the work very

52] much. Although there was not very much work done, there was a good deal of effort put forth at different times.

Q. Was there anything done during that period that could not as well have been done by the employees under Mr. Hoffman in his absence as well as in his presence?

(Objected to by defendant as incompetent and irrelevant and immaterial.)

A. Well, I do not know; I was not on the work personally, and for that reason I cannot state.

Q. How long was the work shut down in that condition? (Same objection.)

A. Well, that I cannot exactly say; I know there was some time there that the weather did not permit very much work being done, but just how long a time that was I cannot exactly say.

Q. Do not you remember that in January, 1894, Mr. Hoffman got a large estimate—some sixteen thousand dollars, and for the three succeeding months his estimate was comparatively small, in April amounting only to \$239.28, and that in May again it swelled to an allowance of over \$48,000.00?

(Counsel for defendant objects to the question as incompetent and immaterial and not the best evidence.)

A. I do not know whether it was in January; it was either December, 1893, or January, 1894; there was a pretty good-sized estimate allowed by the water committee on account of extraordinary delivery of pipe that had been laid.

Q. And did not the three succeeding estimates fall off to practically insignificant amounts?

53] (Same objection.)

A. Yes, they were not very large; I do not know just how much they did fall to.

Q. You say that when Mr. Hoffman went to the Sandwich Islands he left Portland on the 9th of February?

A. Yes.

Q. And returned on the 3rd of April?

A. Well, it was in the early part of April; I could not say just what time—it was about the 3rd or early part of April.

Q. Mr. H. C. Campbell testified that he was with Mr. Hoffman in Honolulu and left him there, and that he returned himself to Portland about the first week in April, and that Mr. Hoffman got back about the middle or third week.

A. Well, my recollection of that is not very clear; it was about either the early part or the middle of April. I thought I remembered the date, but after considering it I do not have that quite clear in my mind.

Q. By what do you determine that Mr. Hoffman was gone only two weeks to Chicago in the fall of 1893 to the World's Fair; is it not a fact that he was gone three or four weeks?

A. I do not remember exactly how long he was gone; I was under the impression that he was gone about two weeks; that was his intention when he left; I think he stated about that time, possibly a little more.

Q. Is there any way by which you can determine the length of time that he was absent?

[454] A. There is a way that I could determine the exact date I think he left, but I don't know positively the date he returned, unless it was by some memorandum which I might have or might find in the books some place.

Q. You do not know whether any such exist or not?

A. I cannot say.

Witness excused.

Thereupon the further taking of testimony herein is adjourned until January 24th, 1896, at ten o'clock A. M.

Office of G. A. Brodie, Portland, Oregon.

January 24th, 1896, ten o'clock A. M.

At this time appear the parties as before, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

H. D. BUSH is recalled as a witness for the defendant, and testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. I show the witness a paper introduced yesterday, marked "Defendant's Exhibit W2, W2, page 2, W2, page 3"; on the first page on the last line are the words, "Bull Run, Copy of Catt's estimate on plant"; I think you stated that you copied

5] that from the original paper furnished to you by Mr. McMullen—I don't refer to the postscript at the bottom.

A. Yes, this part here. (Showing.)

Q. When you say "this part here" what do you mean?

A. Well, the part which is the estimate on the plant I copied that from a sheet that Mr. Catt sent out, and Mr. McMullen brought to the office, and below that I made a note signed by me, or my initials, showing that it would indicate simply that that part of it was my judgment of the estimate.

Q. Did you compare that with the original, so that you know it is a correct copy yourself?

A. I am certain it is a correct copy.

(Counsel for defendant now reoffers the first sheet excepting the postscript, and the same, having been heretofore received in evidence, is marked "Defendant's Exhibit W2"; counsel for the complainant objects to the introduction of the same on the ground that it is incompetent and immaterial, and that the original has not been accounted for.)

Q. I now call the witness' attention to the second sheet, marked "Defendant's Exhibit W2, page 2," headed "Bull Run Catt's estimate of costs of riveted pipe," and I will ask you if you know what that paper is?

A. That is a copy of Mr. Catt's estimate of the cost of making the pipe, including his allowance for profit, etc.

Q. Who made the copy? A. I made the copy.

Q. From what paper?

6] A. From one of the papers that McMullen brought to the office.

Q. What office?

A. Hoffman & Bates' office, in the Worcester Block.

Q. At the time that bids for the work of conducting Bull Run water to Portland were being prepared?

A. Well, I made the copy afterwards.

Q. It was one of the papers that he brought there during that time?

A. Yes, sir; we copied some of these papers before we returned them to San Francisco.

Q. Did you compare that with the original paper that you copied, so that you know it is a correct copy?

A. Yes, I am certain that it is a correct copy down to this point.

Q. Down to what point?

A. Down to "N. B."; then there is a little line there that compares his estimate with the actual bid.

Q. What words were not copied?

A. Well, those words below the pencil line, where it says, "We did bid."

Q. All except the words "We did bid," and the figures "0 275"? A. Yes, sir.

Q. These are copies of the original except that?

A. Except that it is a copy of the original.

(Counsel for defendant offers the sheet referred to by the witness in evidence, except the words indicated, "We did bid," and the figures "0 275," at the bottom, and the postscript; objected to on the same ground as that assigned to the last; the [457] paper referred to is received in evidence and is marked "Defendant's Exhibit W2, page 2.")

Q. I now show the witness a paper marked "Bull Run Pipe Line," W2, page 3, copy of "Catt's estimate of the manufacture and laying as compared with the actual bid."

A. Well, the paper is just as it states here—a copy of Catt's estimate on the item of manufacture and laying as compared with the actual bid.

Q. What, if any, portion of that paper was copied by yourself?

A. Well, the prices, and most of the first column under the head of "Catt's estimate," were copied from one of the papers that were brought by Mr. McMullen to Hoffman & Bates' office from Mr. Catt.

Q. At the time estimates were being prepared on the bid of the Bull Run waterworks?

A. Yes, the copy that was made afterwards.

Q. Who brought the paper there?

A. Mr. McMullen brought the papers there at the time he came to the office.

Q. What is the paper except the last line of the paper and the figures in the last column—what is it?

(Objected to as incompetent.)

A. Well, it is a copy of Mr. Catt's estimate of that one item on the proposal for manufacturing and laying.

Q. By whom was the copy made? A. I made the copy.

Q. Did you compare it with the original, or do you know whether it is an exact copy?

[58] A. I know I compared it very carefully at the time, and I am certain it is an exact copy.

Q. What is the last column?

A. The last column contains the prices and amounts that we actually did bid in the name of Hoffman & Bates, and everything contained in the bid for manufacture and laying.

(Counsel for defendant offers in evidence all of the paper referred to, except the last column; objected to on the ground as that stated to the offer of the other two exhibits; the paper referred to is received and filed, marked "Defendant's Exhibit W2, page 3." It is understood that counsel for the complainant makes, and is allowed to make, a general objection to these exhibits, and to all other exhibits pertaining to the matters transpiring before the execution of the contract, "Complainant's Exhibit No. 1," on the the ground that the matters that are therein contained and represented are immaterial. Counsel for defendant also offers in evidence a paper marked "Bid D" for laying and manufacturing, admitted to be a summary of the estimate of Mr. Catt, vice-president of the San Francisco Bridge Company, on the cost of manufacturing and laying the pipe for taking water from Bull Run to Mt. Tabor, under estimates invited by the Portland water committee, and the same is received and filed, marked "Defendant's Exhibit Y2," G. A. B. Ex.)

Q. Mr. Bush, was I correct in my memory about your statement of Mr. McMullen coming here from San Francisco the day before the bids were submitted, that night before? I don't know whether I was correct in my memory about that.

[59] A. I think I stated he came four or five days before.

Q. Well, if you did say the night before, you did not so intend to state? A. No, sir.

Q. What is now your best recollection about how long before he did come?

A. I think it was four or five days; I have forgotten exactly the exact number of days.

Q. I don't know whether I asked you when you were on the stand before, but I will ask you now whether or not you prepared, before any estimates were received or any papers re-

ceived from Mr. McMullen, an estimate for this work of manufacture and laying the pipe, etc.

A. I prepared an estimate for the item of manufacture and laying.

Q. What, if any, other items were furnished after this by Mr. McMullen, and by whom were they made out?

(Counsel for complainant objects to the question on the ground that it is cumulative, the witness having already testified in regard to these matters.)

A. Well, Mr. McMullen brought estimates made by both Mr. Wood of his San Francisco office and Mr. Catt of the New York office.

[460] Q. I will ask you to look at the paper marked "Defendant's Exhibit U2," and marked in red ink at the top "Copied from San Francisco Bridge Company's estimate," then in black ink "Portland Water Works' Bid A, Head Works," and also paper marked "Defendant's Exhibit V2," in red ink "Copy of San Francisco Bridge Company's estimate," and in black ink "Portland Water Works' Bid C continued manufacture and laying," and I will ask you to state if you ever have seen the original of those papers.

A. Well, I can only say in a general way that before returning those papers to Mr. McMullen's office, Mr. Hoffman wanted them copied, and I copied some of them, and Mr. Donnell copied some, and I undoubtedly saw the original of them during the time that we were preparing bids.

Q. By whom was it brought to the office?

A. Well, it was brought to the office by Mr. McMullen.

Q. Whose estimate did it purport to be?

A. I don't remember; I think it is one of Mr. Wood's estimates.

Q. The original paper was a paper brought to the office by Mr. McMullen?

A. Yes, and this copy was made by Mr. Donnell.

(Counsel for defendant now reoffers the paper last shown the witness in evidence; counsel for complainant objects to the same on the ground that the original has not been accounted for, and on the further ground that the witness did not make the copy, and did not compare, and has not testified that he knows it to be a copy, but that it purports to be such, and was made by a third party; the paper referred to is received and

filed, and has heretofore been marked "Defendant's Exhibit U2 and V2," respectively.)

Q. You knew Mr. Foy very well, did you not?

A. I knew him after he came on the work. I did not know him before that.

[461] Q. What do you know of him as a foreman or superintendent, as being a man of extraordinary qualities—what were his qualities?

A. Mr. Foy was an energetic man, but he apparently had not had any experience in metal work, and he devoted most of his time to the work of digging the ditch.

Q. What was the fact about subcontractors, if you know anything about where they came from?

A. Do you mean the foremen?

Q. Yes.

A. Well, Mr. Foy brought over three or four foremen with him; they were also men that had been accustomed to railway work; they were at work under him digging the ditch.

Q. What was there peculiar about their qualifications?

A. Well, I don't know that there was anything peculiar at all about their qualifications; they were like a good many other railway men—foremen around in this country.

Q. Are that class of men difficult to find, or are they easily picked up?

A. Well, we could have picked up a great many of them at that time.

[462] Q. Did you notice that there was anything superior—any peculiar superiority about these men that Mr. Foy brought over with him as foremen?

A. Well, one of them was a very good man, indeed; his name was Lynch, and another named Hunter Smith was a very poor man—cost us a good deal of money.

Q. Do you know a man by the name of Cooper, an engineer? A. Yes, sir.

Q. Was he here during the time that the work of preparing bids was going on?

A. He was here in the city, yes, sir, during some of the time; my impression is that he went away before the bids were put in.

Q. What, if anything, did he have to do with preparing them, if you know?

A. Well, I think he had nothing to do with preparing them.

Q. I think you stated that you knew Mr. Lockwood?

A. Yes, sir.

Q. What about his connection with preparing the bids?

(Counsel for complainant objects to the question on the ground that it is cumulative, the witness having already testified concerning Mr. Lockwood.)

A. Well, Mr. Lockwood was in the office a good deal of the time, and he worked on the bids to some extent, more particularly on the bridges; that was the part he was most interested in.

Q. In his testimony Mr. McMullen stated that when he came up from San Francisco he brought all the data he had relating to this pipe line business, and took it to Mr. Hoffman's office, and that Mr. Hoffman brought all that he had, and Mr. McMullen and Mr. Hoffman and Mr. Hoffman's engineer and Mr. Lockwood and Mr. Cooper set down together and discussed the matter, and out of the most of the data that they had, and the information they were getting constantly from [463] the east; they finally formulated a bid that was put in; what was the fact about that?

(Counsel for complainant objects to the question as being cumulative, the witness having already testified in regard to these matters.)

A. The fact is that when Mr. McMullen first came up here we compared all our estimates of the cost—

Q. When you speak of "we," who do you mean?

A. I mean Mr. Hoffman, Mr. McMullen and myself; and Mr. Lockwood was there some of the time, I think not at the first, and we finally settled on the fact that the estimates of the cost must be correct.

Q. That is the cost of manufacturing and laying the pipe—what led you to that conclusion?

A. Well, because the three estimates were practically the same; after that it became a question simply of deciding how much profit to put on the job, and that subject was talked over back and forth principally between Mr. Hoffman and Mr. McMullen themselves.

Cross-Examination.

Questions by MR. L. B. COX:

Q. Mr. Bush, Mr. Foy's place as superintendent on this work was in connection with the excavation of the ditch, was it not?

A. Mr. Foy's place as superintendent of the work was in connection with all the work in the field, digging the ditch, laying the pipe, and getting up the camps.

Q. What was the principal work done during the time that Mr. Foy was superintendent?

[464] A. Well, the digging of the ditch and laying and riveting the 35-inch pipe from Lusted's to Mt. Tabor.

Q. Mr. Foy discharged the duties of his position satisfactorily, did he not? A. Not altogether so.

Q. He was retained by Mr. Hoffman for a considerable time? A. Yes, sir.

Q. He afterwards took a subcontract on the ditch in the matter of its excavation? A. Yes, sir.

Q. And did that work satisfactorily?

A. That work was done very satisfactory; yes, sir.

Q. Who looked after any deficiencies there might be in Mr. Foy's work and corrected them?

A. Well, I was supposed to follow up and furnish the experience that he had not had, on the riveting work, I think.

Q. So that if Mr. Foy did not fill the requirements of his position in any particular, it fell back on you to supplement what he was doing? A. Yes, sir.

Q. And you did do it? A. I did, yes, sir.

Q. Mr. Hoffman was also a man without experience in this work, was he not.

A. This particular kind of work, yes, sir.

Q. As much so as Foy? A. Yes, sir.

Q. You say that you prepared all the estimates of cost which Mr. McMullen brought here, what you had made, and from that you determined that the three estimates, being approximately the same, must be nearly correct?

A. Yes, sir.

Q. Is it not a fact that that is the only use that was made of those estimates to determine the cost price?

[465] A. Well, I don't know but what it was.

Q. The calculation of the engineers had nothing to do with the determination of McMullen and Hoffman as to what amount they would add to the engineers' estimate for profit, had it? A. No, sir.

Q. McMullen and Hoffman determined that themselves, irrespective of anything the engineers did? A. Yes, sir.

Q. How do you know these papers, "Exhibit U2 and V2" to be copies of any other papers—can you swear now, as a witness, that they are true copies of any other papers whatever?

A. Well, I think I can swear they are copies subject to such mistakes as Mr. Donnell might possibly have made in making the copies.

Q. Do you remember anything that was contained in the originals?

A. I don't remember any of the exact figures.

Q. You cannot now without reference to that copy undertake to say what was contained in the original at all on any item, can you? A. No, sir.

Q. How can you say it was a copy of any original paper?

A. Well, I remember when Mr. Donnell copied it.

Q. Is it all you know about the matter that there was some original paper, and Donnell made a copy from some original paper, which you assumed to be a copy in your mind?

A. Well, I think they must be copies.

Q. Is it not an assumption on your part—is not that true?

[466] A. That depends on what you call an assumption.

Q. Well, you don't pretend to make a sworn statement that any solitary statement contained in either of these papers, "Exhibit U2 and V2," is a copy of anything that McMullen brought to the city of Portland, do you?

A. To the best of my knowledge and belief they are copies I cannot swear to it as I might if I had made the copies.

Q. Then your testimony in regard to those being copies of papers which McMullen brought to Portland is based on the fact that some of those papers or some of such papers were given by Hoffman to Donnell to be copied, and that these two sheets are in Donnell's handwriting, and purporting to relate to Bull Run matters, and from those facts you assume those to be copies of McMullen's papers? A. Yes, sir.

Q. Look at "Defendant's Exhibit Y2"; is that a paper from which you made a copy, which is found on the third page of "Defendant's Exhibit W2"?

A. Yes, sir; that is the paper from which this copy was made.

Q. Do you say now that your copy is a true copy of the "Exhibit Y2"? A. Yes, sir.

Q. I find on the "Exhibit Y2" the second item, "29 man-holes 255, \$30—\$7,650," and in your copy "Manholes 255, \$30—\$7,560"; do you say that is a true copy?

A. The five and six are reversed.

Q. That is a mistake?

A. Yes, sir. I might explain now there were two estimates furnished by Colonel Smith, one called for 11,782,000 pounds [467] and one for 11,784,000 pounds, and some of the estimates that were made were on the basis of the 84,000 pounds; this one here is; that figure there does not come into this statement.

Q. The first figure of the page you mean to say?

A. Yes, sir.

Q. The \$324,000 item is based upon the 11,784,000 pounds.

A. Yes, sir.

Q. I find an entry in "Exhibit W2, page," "2 stand pipes," that is an addition by you, is it not, not found on Catt's estimate at all?

A. No, sir, that is steel plates.

Q. On "Exhibit W2, page 3," there appears the words "2 stand pipes"; that is an addition by you, not found on Catt's estimate?

A. Those words are an addition; yes, sir.

Q. I see an entry on Catt's estimate "Exhibit Y2," "foundation concrete or cement," and in your estimate "W2, page 3," "foundation concrete."

A. It could not be concrete or cement.

Q. Here it is (showing).

A. That is what it says, but it does not mean anything.

Q. It is not so worded on your statement? A. No, sir.

Q. I find in the statement "W2, page 3," the words "Sleeve joints" not to be found on the Catt estimate, is it?

A. Those words are not.

Q. I find the first item under that head in the paper to be "Wrought Iron, 7,000—10, \$700"; on the copied paper

[468] "Wrought Iron Sleeves, 7,000—10, \$700"; you departed there again from Catt's paper?

A. Not from the figures, from the wording.

Q. You omitted from Catt's paper the word "sleeves"?

A. Yes.

Q. In your paper you have inserted next below the word "trestles"; that is not found on Catt's paper, is it?

A. Yes.

Q. That is not found on Catt's paper. A. No, sir.

Q. In the Catt paper I find the second item below that "Foundation concrete, 400—\$12, \$4,800"; on your paper simply the words "Concrete 400 years, \$12—\$4,800"; there is a discrepancy there again?

A. Discrepancy in the wording.

Q. I find on your paper a footing, "Total without excavation, \$318,638" that does not appear at all on Catt's paper.

A. No, sir.

Q. I find, further, on the next statement below on your paper the words "Excavating and refilling"; that don't appear on the Catt paper, does it?

A. No, sir, the heading is omitted from this paper.

Q. I also find certain footings on your paper, or a certain footing on your paper of an item under the head of "Excavating and refilling amounting to \$97,400"; that does not appear on the Catt paper, does it? A. No, sir.

Q. In Catt's paper I find a number of figures preceding each one of the entries which he has listed, all of which are omitted on your paper, is not that the fact? A. Yes, sir.

[469] Q. It appears, then, that you have taken a number of liberties in making a copy of Catt's paper, is not that the fact?

A. There seems to be some minor changes in the wording, etc.

Q. Still you state it is an exact copy?

A. It is not absolutely an exact copy.

Q. Now, can you say that what you have testified are copies of other papers which you made, and which are not before you, are any better copies than page 3 of "Exhibit W2"?

A. I don't know as I testified there are any better copies.

Q. Can you say that there are any better copies?

A. No, sir, I cannot say that they are any better copies.

.Q Can you undertake to say that they are exact copies at all.

A. I swear to the best of my belief they are exact copies as far as the figures are concerned.

Q. You mean by that they are substantially good copies?

A. Yes, sir.

Q. You don't pretend to say that they are exact copies?

A. There might be slight changes in the wording.

Redirect-Examination.

Questions by MR. R. MALLORY:

[470] Q. The total result of the figures that you copied is the same, is it not, and you know it to be such?

A. Yes, sir.

Recross-Examination.

Questions by MR. L. B. COX:

Q. You got that total by an error in the computation, did you not?

A. Well, I copied Mr. Catt's total without adding it up; there is an error there, and it shows that I copied his total instead of adding it up.

(Signed) HARRY D. BUSH.

Witness excused.

C. F. SWIGERT is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. Mr. Swigert, state your name, age, residence and occupation?

A. My name is C. F. Swigert; age 33; I am treasurer of the Pacific Bridge Company, also of the City & Suburban Railway Company; my residence is Portland, Oregon.

Q. How long have you been connected with the Pacific Bridge Company?

A. Since 1880.

Q. In what capacity?

A. Well, I don't know exactly what, before I became treasurer—sort of agent.

[471] Q. Have you had occasion to do any business in the way of contracting for that company? A. Yes, sir.

Q. I will ask you what is the business of the Pacific Bridge Company? A. General contracting.

Q. General mechanical work and other work?

A. Yes, general contract work.

Q. Were you acquainted with Mr. Hoffman in his lifetime?

A. Yes, sir.

Q. Do you know Mr. McMullen? A. Yes, sir.

Q. Are you acquainted with the work of constructing the pipe line from the head works of Bull Run to Mount Tabor?

A. Only in a general way.

Q. You have a general knowledge of the situation of the country? A. I have been over the line.

Q. You know about the character of the work that was to be done? A. Not in detail; I have seen it.

Q. You have a general knowledge of what it is?

A. Yes—well, I never made any figures on the work; I did not make any estimates at all.

Q. Do you know anything about the work that Mr. Hoffman had to do as superintendent of the manufacturing and laying of the pipe from Bull Run to Mount Tabor for conducting water to Portland?

A. Well, I knew that he was the contractor for it and the head of it. I don't know that I ever heard him refer to himself as superintendent; he was the head of the firm.

Q. And general manager of it? A. Yes, sir.

[472] Q. I will ask you if you know what he did and what would be required of him to do in the position that he occupied?

(Counsel for complainant objects to the question on the ground that the witness has not shown himself competent to testify on that subject.)

A. I cannot state, of course, exactly what he did. I can state what he would ordinarily do.

Q. State what he would have to do in such a position?

A. He would have to have a general supervision of the work; he would have to handle the financial matters, and I know he did handle the financial matters, because he talked to me about it.

Q. You say that he talked with you about it?

A. Yes, sir. And he would also, as a natural result of his position, have the general overlooking of all matters pertaining to the work.

Q. I will ask you to state what experience you have had in doing work of general contracting similar to that Mr. Hoffman was required to do—not exactly like it in detail, but in a general way. What experience have you had, or what knowledge have you had in matters of this sort, and the value of such work, the superintending of such work? State if you have had any experience or not.

A. I have never had any experience in superintending work of that magnitude. I have superintended work of lesser magnitude.

Q. Works similar in their character to this?

A. Well, they were general contract work. I never had any pipe line. I have superintended the building of bridges, wharves, and some little grading work.

Q. Where have you done that kind of work?

[473] A. In Oregon, Washington, Central America; I did a small job in California.

Q. You say you did work in Central America? How large a contract?

(Counsel for complainant object to any testimony as to what the witness did in Central America, as too far removed from Oregon, unless it be shown that the conditions prevailing were similar to those prevailing in Oregon where this contract was done, on the ground that the same is irrelevant.)

A. Well, the price of the work was \$115,000. I was there; that was the only job I did at that place.

Q. How extensive work have you done in Washington and Oregon?

A. Jobs of all sizes; about \$80,000 is the largest.

Q. From what experience you have had in these matters, do you know what the services of a superintendent ought to be worth, and when I say superintendent I mean general manager occupying the relations to the work that Mr. Hoffman held to this?

(Counsel for complainant object to the question on the ground that it is incompetent, it not being shown that the witness knew what Hoffman did, and it not being based upon

any such hypothesis; and on the further ground that the witness has not shown himself qualified to pass an opinion on the subject, and his answer thereto is incompetent.)

A. I would have an opinion.

Q. Just answer whether you would have an opinion or not.

[474] A. I did express my opinion to Mr. Hoffman on the trip that I made with him to Bull Run.

Q. Just answer the question generally, yes or no?

A. My opinion is that \$15,000 a year—

Q. No, I did not ask what your opinion was. I asked you to state whether or not you have sufficient knowledge of what he did to know what his services are worth.

(Same objection.)

A. Yes, sir.

Q. Now, I will ask you to state, from what you know of what Mr. Hoffman did in connection with the contract as general manager, what do you say his services were worth per year or per month?

(Same objection.)

A. I think his services are worth \$15,000 a year. I think that would not be too high for the services that he performed.

Q. Well, how did you acquire knowledge of what services he performed—from Mr. Hoffman?

A. Well, from visits to his office and from going out with him on the line, and in a general way seeing what was to be done.

Q. And conversations with him?

A. Yes, I had some conversation with him; I have had a number of conversations with him.

Q. Now, Mr. Swigert, did you ever have any conversation with Mr. Hoffman about the matter of procuring sureties on his bond on the contract which he had for manufacturing and laying pipes from Bull Run to Mount Tabor?

(Question objected to as incompetent.)

[475] A. Yes, sir.

Q. State when and where that conversation occurred, if you know.

(Same objection.)

A. In July, 1894, I made a trip to Mount Hood with Mr. Hoffman.

(Counsel for complainants now interposes a further objec-

tion to this evidence, on the ground that the information the witness got from Hoffman, in addition to being hearsay, was derived a long while after the bond had been procured.)

The WITNESS.—Shall I go on?

Q. Yes.

A. We made a trip to Mount Hood together and were gone several days. We were together a good deal of the time, and he took occasion to say that it was a great relief to him that Mr. Willis volunteered to go on the bond. He said Mr. McMullen did not and could not furnish a bond, and he was safe on one of the bondsmen, Mr. Bates, but he did not know where to get the other, and that he went to Mr. Willis' office and spoke to him about his trouble, and Mr. Willis volunteered himself to go on the bond, and that relieved him, and he had not expected Mr. Willis to do that; that he had supposed Mr. McMullen would furnish a bond, which he should do.

Q. I will ask you if you had any other conversation with Mr. Hoffman in regard to the manner in which the contract was obtained in the first instance.

(Objected to as incompetent.)

A. Yes, he told me at some length the details of the figuring, where the information came from; that Mr. McMullen brought a lot of information, and that Mr. Bush made estimates, and he laid particular stress upon one point, that Mr. McMullen came up prepared to bid a sum much lower than he then believed that the work could be done for, or that he was prepared to bid for the work, and we had some argument and some question as to what the work ought to cost at the time. He said Mr. McMullen thought the work could be done for much less than it really was finally let for.

Q. Did he say how the bid came to be raised—at whose instance?

(Same objection.)

A. Yes, he said it was at his instance; that he continually wanted the bid higher than Mr. McMullen did.

Q. What, if anything, was said about the bid as finally submitted being reduced, and at whose instance?

(Same objection.)

A. Well, he said it was—I am not positively sure that it was the morning that the bid was put in; it was very close to the time that the bid was put in—that Mr. McMullen came in and said they would have to cut the excavation; that he knew

or felt positive that other people were making a bid lower than their bid, and in order to secure the work they would have to cut their figure, and he said they did cut the figure.

Q. Was anything said by him to you concerning the bid put in by Mr. McMullen in the name of the San Francisco Bridge Company?

(Same objection.)

A. He said Mr. McMullen put in a bid in the name of the San Francisco Bridge Company.

[477] Q. Did he say what the purpose of it was, if anything?

(Same objection.)

A. Well, he said that the Hoffman & Bates bid was the lowest aggregate bid, but that the San Francisco Bridge Company's bid was lower on some particular points—in some particulars—on the furnishing of the steel plates. I asked him why that was. He said that they had an idea that either of their bids might take the steel plates, and that in case his bid was the next higher than the San Francisco Bridge Company's their intention was to try to get it on the total aggregate low bid, but if necessary they would take it on Mr. McMullen's bid on the lower price for the plates.

Q. Did he say anything about this condition of things—that in case the bid of the San Francisco Bridge Company on the plates should be the next lower to the bid of Hoffman & Bates on the same—if any arrangement was made as to how they would manage to get the work on the bid of Hoffman & Bates?

(Same objection, and also on the ground that the question is suggestive and leading.)

A. Yes, he said that they intended to plead that they ought to have all or none of the work—that is, that the aggregate low bid should be the one considered. I objected to that and said I thought the work was advertised in different sections, and I did not see how they could have hoped to win on that, as the result showed that it was let in separate sections. He said that Mr. McMullen thought they could withdraw the bid anyway. I asked him what reason he had for thinking so, and he said Mr. McMullen said it had been tried in California, and that they could not hold a certified check if the men wished to withdraw.

[478]

Q. What, if anything, was said as to whether any arrangement was entered into between Hoffman and McMullen as to

whether, in case the Hoffman bid was the next highest to McMullen's, that McMullen should withdraw—did he say anything about any arrangement of that sort being made?

(Same objection.)

A. He said that was the intention; that they would do that if they could.

Cross-Examination.

Questions by MR. L. B. COX:

Q. Mr. Swigert, did all these matters concerning which you have testified as having been communicated to you by Mr. Hoffman occur during the trip of you and himself to Mount Hood?

A. I think all these matters did, Mr. Cox; we had a good many conversations.

Q. I speak of the matters now concerning the circumstances of getting the contract and McMullen bringing a lot of estimates and information to Hoffman's office, and Bush making estimates.

A. Yes, sir; that occurred on that trip.

Q. Hoffman told you that McMullen came up prepared to bid less than he thought advisable to put in, and that Hoffman continually wanted the estimate raised, and that it was reduced at McMullen's instance, and these matters which you have testified in regard to their trying to withdraw certain bids to get the contract for the whole work on the aggregate bid—did that occur on that trip?

A. Yes, that was on the trip to Mt. Hood.

Q. Mr. Hoffman must have been extremely communicative on that subject during that trip, was he not?

A. Oh, yes he was, yes.

Q. What time did you say that was?

A. That was in July, 1894. I think we left here on the 17th of July. I could find out if it is of any importance.

Q. 1894? A. Yes, sir.

Q. At that time there had been a breach between Mr. Hoffman and Mr. McMullen, was there not, and Mr. Hoffman was claiming to have the thing in his own hands?

A. Yes.

Q. And he was undertaking to tell you why he had put McMullen out of the firm?

A. Well, I really don't know whether that was his intention or not, Mr. Cox.

Q. Well, did you and he have any talk about his expelling McMullen from the firm?

A. Yes, we talked about that.

Q. He gave you these reasons, did he not?

A. No, he did not mention this as any reason why he should have expelled Mr. McMullen. He said Mr. McMullen did not keep his part of the agreement.

Q. Consequently he put him out?

A. Yes, sir.

[480] Q. You were on very intimate terms with Mr. Hoffman during his lifetime?

A. Yes, I think I can safely say I was.

Q. You had frequently been associated with him in business enterprises? A. Yes.

Q. And personally were on exceedingly friendly terms with him?

A. Yes. There may have been times when we have not been so particularly cordial, but on the average I think we were.

Q. The business relations of the Pacific Bridge Company with Mr. Hoffman at that time were pleasant, were they not?

A. Yes, they had been for a number of years; we were at one time associates.

Q. Is it not a fact that the Pacific Bridge Company is now indebted to the estate of Hoffman in the sum of \$5,000?

(Question objected to as immaterial.)

A. Yes, sir.

Q. You have felt and expressed sympathy with Hoffman, have you not, in his relations with McMullen concerning this work?

A. Yes, I have felt it, and I suppose I have expressed it; I do not remember any particular instance.

Q. And your sympathies are based upon your understanding of the matter as given to you by Mr. Hoffman?

A. I suppose it must have been. I never heard anything from Mr. McMullen on the subject.

Q. You were not on such friendly terms with Mr. McMullen as you were with Hoffman?

[481] A. I cannot say that we have ever been intimate; we have always been friendly.

Q. But you did not have the same cordial relations with Mr. McMullen as you did with Hoffman.

A. No, sir.

Q. You say you knew Hoffman as the head of the firm. What firm did you refer to?

A. Hoffman & Bates.

Q. That was Hoffman, was it not?

A. Well, it was principally Hoffman; I do not know that anybody else had any interest in it; he was recognized as the head of the firm.

Q. How many times did you go on the line of that work with Hoffman?

A. I remember once that I went out to the Sandy Bridge with him, and I was out beyond Mt. Tabor twice.

Q. How far out?

A. Beyond Mt. Tabor. One of the times we went to Grant's Butte, and the other time we did not go quite so far.

Q. How far is Grant's Butte?

A. I think that is about three miles from Mt. Tabor.

Q. One visit you went about three miles on the line of work, one trip you did not go so far, and one trip you went to the Sandy Bridge? A. Yes.

Q. How far is that?

A. From Portland to the Sandy Bridge is about thirty miles; I am not sure about that; and I think it was about five or six miles from the Sandy Bridge to the head works.

[482] Q. What time did you go to the Sandy Bridge?

A. I think in November, 1894. I know they were putting the pipe across the bridge; it had been laid from both ways to the Sandy Bridge, and they were laying it on the Sandy Bridge when I was there.

Q. It was about the completion of the work?

A. Yes; they completed it shortly after that time.

Q. What time was it during the progress of the work that you went on the trip to Grant's Butte and the place you have stated?

A. I do not remember, I cannot say. I drove out with Mr. Hoffman in the afternoon; I have no recollection of the time.

Q. Did you make any close examination of what was being done, or what Hoffman was doing on this trip?

A. Oh, not very much, generally.

Q. How many times did you visit his office and discuss these matters with him, and to see what he was doing?

A. I do not know; I have been there quite often.

Q. Do you think a dozen times, all told?

A. Yes, I think more than that. I did not always discuss this matter when I went there.

Q. What was Hoffman doing when you observed him in his office?

A. Well, I cannot say in detail what he was doing.

Q. Smoking cigars and talking to you?

A. He smoked some cigars and he talked some to me.

Q. Is it not a fact that Hoffman had competent foremen to take care of this work?

[483] A. I believe he had a clerical force; I do not know of any more. I thought he looked out for everything himself; I was under that impression.

Q. You never have had any experience in constructing work of that character yourself?

A. Never any pipe line.

Q. What is the closest you ever came to it?

A. I have had something to do with railroad grading, and this last summer we laid some pipe, but nothing of that magnitude.

Q. What sort of pipe?

A. Distribution pipes, from 18-inch down.

Q. Where—in the city here? A. No; in Astoria.

Q. What was the amount of the contract?

A. Well, the furnishing and laying was about \$40,000, all told.

Q. What is the extent of your experience in railroad grading?

A. Oh, nothing that was remarkable at all. We graded about ten miles of railroad in California.

Q. How were the conditions there in regard to cost of labor and material and the employment of superintendents and things of that sort, in comparison with those that prevailed here at the time this work was done?

A. Well, the experience that I had there was a number of years ago; it was probably twelve or thirteen years ago. I remember very little about the prices that prevailed then. I do not know anything about the prices that prevailed with

Mr. Hoffman, except that he told me that he paid Foy \$250 a month.

Q. I am not talking about the subcontractors; I am speaking about the general conditions.

[484] A. I do not believe I know how to answer that question.

Q. What was the magnitude of the railroad grading that you did?

A. It was not heavy work; there was about ten miles done altogether.

Q. What was the size of the contract?

A. The contract was for a large sum, but was not fulfilled. I was a subordinate there.

Q. About how much of it did you do?

A. You mean myself personally?

Q. Yes.

A. I was employed as timekeeper; I was not in charge.

Q. How much were you connected with?

A. About ten miles.

Q. Ten miles of work? A. Yes, sir.

Q. That is the closest character of work to this under consideration that you have ever had any direct connection with?

A. In the way of excavation, yes, sir.

Q. Have you ever had anything to do with pipe laying except this Astoria business? A. No, sir.

Q. What, then, do you base your estimate of Hoffman's services at \$15,000 a year for superintending upon?

A. Well, principally upon the magnitude of the work, the large amount that was involved, and the large amount that would be sacrificed by incompetent management.

Q. Well, have you made any allowance there for his having competent or incompetent persons in his employ?

[485] A. Oh, he was supposed to look out for that; he was the man that was at the head of it; the others were all subordinates.

Q. Assuming that Hoffman had a full force of qualified subordinates under his direction, an engineer, superintendent, bookkeeper, purchasing and disbursing agent—would that alter your estimate in any degree as to the value of his services?

A. I should judge if he was at the head of it he would be entitled to the emoluments.

Q. He should have that anyway? A. Yes.

Q. Do you think anything of the fact that Mr. Hoffman had never had any experience in that sort of work himself before?

A. He never laid any pipe—I don't believe he ever did; I don't know; but he had experience in quite a number of works—grading works, and things of that kind.

Q. Grading works? A. Yes.

Q. Now, Mr. Swigert, do you know, during the whole time that you have lived in Oregon, any man on any similar work, whether in character or value, who has filled the position that Hoffman has filled, and who got \$15,000 a year for his services or half of that?

A. No; I do not know what they got.

Q. You then do not know what prices have prevailed for superintendents in such cases?

A. In such cases the superintendent was usually the contractor, ordinarily.

Q. Hoffman was the contractor in this case?

A. Yes, sir.

Q. Then that would be a parallel case with this?

A. Yes, if they got it all it would be.

[486] Q. Do you know any instance in which a superintendent, making a charge or claiming a charge against work in any degree similar to this, either in character or amount, has claimed or been allowed, whether he was the contractor himself or operating for others, one-half the amount which you say would be a proper compensation in this case?

A. I do not know of any similar case; I do not know of anything that I would call a parallel case at all.

Q. Suppose that Hoffman was interested with McMullen in this work, and that they were equal partners, and that Hoffman was superintendent, making a charge against the firm, what would you say then would be a proper charge for his services?

A. Well, it seems to me if that was the only question involved, Mr. Cox, and Mr. Hoffman was a partner and he managed this work, and in managing this work he lost his opportunity to engage in other work, which Mr. McMullen did not do, my estimate is based altogether upon the actual performance of the duties of superintendent—that is, some sacrifice that he made in order to perform those duties.

Q. Do you know of any sacrifice that Mr. Hoffman made?

A. I cannot state them in detail. I only just think he made them.

Q. Don't you think he would be very likely to make such sacrifices as he may have done for the amount of \$15,000 a year?

[487] A. Oh, he might easily have made \$15,000 a year in other respects.

Q. He might have made \$15,000 otherwise?

A. Yes, he could have made a good deal more than that.

Q. He also had his profit in this work over and above his salary?

A. Yes; but that would be his share; that would be what he would be entitled to over and above his share as a partner.

Q. Now, Mr. Swigert, do you know of any contracts of this magnitude that Mr. Hoffman ever had had before that?

A. Well, I really do not know the amount of the contracts. He had a great deal of work.

Q. This was the biggest one that you know of his having?

A. I do not know the figures. I think the Kenewick bridge amounted to about \$300,000, and the snowsheds on the Northern Pacific ran up into the hundreds of thousands.

Q. Did Mr. Hoffman build these snowsheds?

A. It was the firm of Hoffman & Bates.

Q. Do you know what arrangement was made between him and his partner?

A. They were all working partners; I do not know that there was any particular arrangement with Mr. Bates; they simply divided profits.

[488] Q. This is true, is it not, Mr. Swigert, that commencing with the summer of 1893, after the time that the actual construction of this work commenced, there was a great financial crisis prevailing throughout the country and continued throughout the entire prosecution of this work, which had the effect of cutting down prices of everything—labor, material, salaries, and everything of that sort.

A. Yes, sir.

Q. And you say that during this time and under those conditions, in your judgment, \$15,000 a year was a proper salary to be allowed Hoffman for his work under this contract?

A. Yes.

Q. What would you say would have been a proper compensation in 1892 for similar work?

A. I do not think there would be much difference. I think that his services were all the more valuable rather than otherwise if he had to labor under those additional difficulties.

Q. I will ask you this question: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland, under a contract which stood in Hoffman's name. The contract price was \$465,667.00 and the contractor was required to furnish a bond in the sum of \$140,000, which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of capital to the transaction of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland, should be the active superintendent of the work, but that McMullen, who resided in San Francisco and controlled offices there and in New York and Seattle, [489] should render all services which should be required of him at those points. The work was actually begun in June, 1893, and between March 10, 1893, (the date of Hoffman's contract with the water committee), and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work and gave it all necessary attention, and McMullen continued his aid, of the character above indicated, until September 20, 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of implements, tools, live stock, machinery, camping outfits, etc., required for the work between June and September 20, 1893, Hoffman found two-thirds and McMullen one-third,

the value of the latter being estimated from \$1,600 to \$2,300. Owing to his inexperience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman except in the matter of furnishing money, until September 20, 1893. During this time an engineer and a superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20, 1893, [490] McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned, but Hoffman advanced from his private means at various times in the months of June, July, and August, 1893, the sum of \$14,500 or thereabouts, which was covered by his estimate paid by the water committee on Sept. 1, 1893, and thereafter Hoffman did not have, or need not have had, any money of his own in the job. Money was very tight, and salaries and wages were affected thereby, as you have testified. In the partnership contract between Hoffman and McMullen there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts what do you deem a proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen, during the time between March 6 and September 20, 1893?

(Counsel for defendant object to this question, for the reason that it is an assumption of facts not proven, and that it is immaterial, and that the question is not proper cross-examination, and that there is no allegation in the complaint justifying any testimony as to the relative value of services of McMullen and Hoffman, and no claim for any compensation, either directly or indirectly, to McMullen for whatever services he has performed, and that the only question in the case is, what was the value of the services which Hoffman rendered as general manager to this work, and not what was its relative value as compared with what Mr. McMullen may have done or furnished.

[491] A. That is a pretty long question, Mr. Cox, and I do not know exactly what you want me to answer.

Q. Assuming the facts presented to you in this question to be true, as representing the circumstances and conditions

connected with this work—in the light of those facts, what do you say was a reasonable compensation for Hoffman for his services during the period of time indicated?

A. The hypothesis does not change my opinion at all as to the compensation to Mr. Hoffman.

Q. You still say \$15,000 a year?

A. Yes, I see no reason to change that.

Q. And you say that, whether McMullen did anything or did not do anything?

A. Well, I think if Mr. McMullen did anything, he should be allowed for what he did. I do not know what he did; I do not know what his services amounted to; the allegations there are not very clear on that.

Q. Then if McMullen had contributed anything of value to the enterprise during the time indicated, that value, after it should be ascertained, should be deducted from your estimate as to what should be paid Hoffman?

MR. MALLORY.—The witness has not said that.

A. I should not think it should be deducted. I should think if Mr. McMullen contributed services that were of value they should be allowed for; but I have no knowledge of what he contributed, and the allegations, it seems to me, are very indefinite as to what he did contribute.

Q. Does the fact that instead of the time indicated by my hypothetical question—three months—this work continued for some twenty months, make any difference in your estimate as to what should be allowed Mr. Hoffman for his services during the continuance of that work?

[492] A. I don't believe I clearly understand the effect of your question, Mr. Cox.

Q. Well, if the job had lasted a short time you say it would be worth so much per month during that time. Would it alter your opinion in any degree if the job had been a very extensive one and covered a great many months—would you allow Mr. Hoffman the same rate for twenty months as you would allow him for three months?

A. Why, yes, I think so, Mr. Cox; I do not see any particular reason why I should not.

Q. Between the 10th of March and the 1st of June Mr. Hoffman was engaged in getting ready for the work which

was commenced in June. Do you know what he was doing during that time? A. No, sir. *

Q. Would you say his services during that time were worth as much as after the work had actually been commenced?

A. No, sir; I should not think they would be.

Q. What would you say a proper allowance for his services would be during the months of March, April, and May preceding the active commencement of operations?

A. That, is supposing he devoted his time to the matter?

Q. Yes, getting ready for the job, of which you say you have general knowledge.

A. That is a question I have not given any thought at all to, Mr. Cox, but I should judge five or six hundred dollars a month would be a proper allowance.

Q. \$500 or \$600 a month? A. Yes, sir.

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Redirect Examination.

Questions by MR. R. MALLORY:

Q. Mr. Swigert, I would like to ask you this question: In the matter of preparing for a work of that magnitude, would or would not the services of a manager, a person who had to furnish supplies and men to carry it on and provide a plant and arrange for it, would his services be worth any less then than they would be after he got it all organized and ready to proceed—where he had to prepare his plans—would his services be less during that time than it would be while he was simply carrying out the plans that he had arranged?

(Counsel for complainant object to the question on the ground that it is based upon a false assumption of facts.)

A. Yes, I think they would, for the reason that the preparations for carrying out this work were not of a character that involved the expenditure of a large sum of money, so that the preparation for the work was not really as difficult a matter—that is, the preparation for the plant, which I understand was Mr. Cox's question; he was getting ready and preparing a plant which was required for this work. During the time that he was making those preparations I should judge his services were not so valuable as they were when the work was actually in progress.

Q. Let me ask you this question: When a work involving the expenditure of nearly half a million of dollars had to be provided for to establish the work in getting ready and getting [494] ready for carrying it forward, and plans had to be matured for conducting it, thus requiring time, and there was a space of three months from time the contract was let until the work in the field actually began—now, I want to know whether, in your opinion, the services of a man who organized this system and arranged for the money to put it in position so that he could proceed with the actual construction when the time came would be of any less value than it would be when he was actually executing it?

A. Well, I was not taking into account the question of arranging for money or contributing money in my estimate of the value of his services.

Q. Then I will ask you this question: Suppose that between the 10th day of March—the time this contract was let or signed by the city—and the 1st of June, Mr. Hoffman was required to and did make arrangements for procuring the necessary funds to start the work and make arrangements for conducting it, and arrange for the employment of his men, and arrange for his plant, and arrange generally so as to be ready for the work to carry it on after the first of June—now, what less value would there be to his services during that time than there would be after he had actually got his men in the field to carry out the plans that he had already matured?

(Counsel for complainant objects to the question on the ground that it is based upon a false assumption of facts.)

A. Well, I think that if he spent particular time and was at particular trouble to provide money for this arrangement, that would be after my estimate of the value of his services. I was not taking that into account at the time, because I [495] simply did not know it. I should think that that would probably bring the work up to the same value as before. But while the work was actually going on the superintendency of the work would be more valuable, because it involved the expenditure of a much larger sum of money. But if, for instance, during this time they had been purchasing a plant for the manufacture of pipe, that would involve a very large sum of money, I think his services would be very valuable. But as a matter of fact, as I understand it, these preparations were not very extensive and did not require a very large sum of money,

and did not require the same degree of watchfulness as was required for the actual carrying out of the work. But if he was called upon to do a good deal of work and to furnish money and to make such preparations as that, I should judge it would not be unreasonable to suppose that his services during those three months were the same as the other.

Q. Whenever the work was commenced a considerable sum of money would necessarily be required to be furnished by the contractor, because he would not get any money until the estimates were furnished him by the city, and he would necessarily be required to furnish a considerable amount of money himself? A. Yes.

Q. Now, would the fact that he had to make preparations for that money as well as to organize a system by which he could carry on the work—would that have anything to do in determining what was the value of his services during those three months?

(Counsel for complainant objects to the question on the ground that it is based upon a false assumption of facts not warranted by the evidence.)

[496] A. You are supposing that he had to furnish all this money for the benefit of the partnership?

Q. Yes.

A. I should think that would increase the emoluments also; if he was furnishing the money as well as the work for both ends of the concern I should think that would necessarily increase his compensation.

Witness excused.

WILLIAM M. LADD is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. State your name, age, residence, and occupation?

A. W. M. Ladd; 40 years old; banker; residence, Portland, Oregon.

Q. Were you acquainted with Lee Hoffman in his lifetime?

A. Yes, sir.

Q. What bank are you connected with?

A. Ladd & Tilton.

Q. What is the nature of your relations with that bank?

A. Managing partner, sir.

Q. Were you in that position in the bank during the year 1893?

A. After January 6, 1893, I was managing partner; before that I was junior partner.

[497] Q. You stated that you were acquainted with Lee Hoffman in his lifetime? A. Yes, sir.

Q. I will ask you to state where he did his banking, if you know, during that time?

A. Ladd & Tilton had an account on their books, and had at that time in the name of Lee Hoffman, and one in the name of Hoffman & Bates, of which he was proprietor.

Q. Do you know of Mr. Hoffman having taken a contract from the city water works committee to manufacture and lay pipe for conducting Bull Run water from Bull Run to Mount Tabor about that time?

A. I understood he had a contract; yes, sir.

Q. I will ask you if you remember anything about the difficulty the water committee had in selling their bonds about the latter part of August?

(Objected to unless it be shown that the witness is conversant with the facts.)

A. They had difficulty in the year 1893 in regard to selling their bonds; the reason I know is because Mr. Failing came and talked with me once or twice in regard to the possibility of the water committee having to make their payments and not being able to sell their bonds, and wished to know if I would join with them in a pool to make the necessary advances to take care of the payments until the bonds should be sold.

Q. Can you state about when that was.

[498] A. No, I cannot give you the exact date; that was during the panic of 1893; I don't know just what time their bonds were sold in 1893; there was some bonds sold, I think, in September, 1893; all bonds, if I remember rightly, that were sold by the city during that time were taken by the purchasers with hesitancy; the city hall bonds were taken up piece by piece.

(Objected to as irrelevant and immaterial.)

Q. Go on and state the whole matter and your means of knowledge.

A. The only way I know in regard to the water bonds is from Mr. Failing talking with me in regard to the possibility

of their being unable to sell them, and then came the discussion of the question of selling in the fall of 1893 at 97½.

Q. Who was Mr. Failing, and what relation did he have to the water committee?

A. He was chairman of the water committee.

Q. This conversation that you had with Mr. Failing, do you remember whether it was before the 15th of September?

A. No, sir; I cannot place the date definitely.

Q. Now, I will ask you if you had any conversation with Mr. Hoffman in reference to arranging for funds to meet the bills that were likely to accrue on account of the work that he was carrying on in constructing this line of pipe—laying this pipe for conducting Bull Run water to Mt. Tabor?

(Counsel for complainant objects to the question so far as it relates to any conversation with Hoffman, on the ground that it is incompetent.)

Q. I understand that what you want to know is whether he came to get any money of me or to make any arrangements?

499] Q. That is what I want to know, if you had any conversation on that subject.

(Same objection.)

A. Yes, I had.

Q. State what it was.

(Same objection.)

A. As near as I can recollect, Mr. Hoffman came to me twice in regard to borrowing money, because he anticipated the possibility of the water committee not disposing of their bonds and be able to pay him the payments as they came due, so he wanted to be in a position to keep up with his sub-contractors; I told him he could have the money, but he never came for it; I think he did borrow money at different times of me, but I don't think they were sufficient sums to warrant being for this particular work.

Q. He did not call for the money, but made arrangements for it?

A. Yes, sir; he came and asked if he could have it in case he did not get it from the water committee, and I told him yes.

Q. Are you willing to fix the date of that conversation, or approximate the date?

A. Well, I cannot fix the date beyond this, that it would be as the date approached for receiving his money from the

water committee; now, Ladd & Tilton's books show that he received on the 21st, I think, of September, 1893, a large payment, which I think came from the water committee, because the check which went to his credit was on the First National Bank; I think that his books show that.

[500] Q. Now, do you remember if that conversation that he had with you was prior to that time?

A. Yes, I cannot place the date, but I feel certain that it was; and then there must have been some other time when they were in the same fix, because I recollect he came twice at least in regard to the matter.

Cross-Examination.

Questions by MR. L. B. COX:

Q. When was the other time, before or after this?

A. I cannot say, Mr. Cox; it was during the panicky season, when the bonds were hard to sell and get money for them.

Q. Are you able to determine that the conversation concerning which you first spoke took place prior to the 21st of September at all?

A. Yes, sir, I think so; the reason for my thinking so is that he came, as I said, twice, and there might have been more times, and if he could establish the question as to when the bond sale was made, it was prior to that time; it was then a question as to whether the sale would be made or not.

Q. Assuming that the sale of bonds was made on the 20th of September, 1893?

A. I think the sale of bonds was made on the 16th.

Q. On the 16th?

A. I think one of the conversations was prior to that time, possibly both.

Q. You are not sure about that? A. No.

[501] Q. Is it not a fact, Mr. Ladd, as far as your knowledge extends, that Mr. Hoffman was never in any apprehension of the shortage of money of the water committee until this September payment? A. That I cannot say.

Q. Can you say that he was—do you recall his ever having made any representations to you that he was in any difficulty and in fear that he would not get his money from the water committee except this payment which was made to him on the 20th of September?

A. I don't know that he said he was in any difficulty at all; my impression is that he came to me when he first made the contract, and talked about money matters in case he needed money to carry out the contract, he wanted to know if he could depend upon it; he was in the habit of asking for funds from time to time whenever he required money to carry on his bridge contracts; he always had collateral on deposit in our vault, so that that was there, and while I cannot place any particular date, I can remember his coming to the side counter there and talking with me in regard to the difficulty he anticipated in regard to the water committee not getting this money.

Q. Is it not a fact that one of the conversations that you had referred to the general one which Hoffman had with you at the commencement of the work, and the other was in regard to his apprehended failure to get his assessment on September 20th?

A. No, sir; I think he talked with me twice.

Q. After the first general talk?

A. Yes, sir.

Q. Let me ask you if you don't remember that in the winter 502] following September, 1893—that is, the winter of 1893 and 1894—that Hoffman's estimates were very small, and that it was at that time that he spoke to you about money?

A. I have no recollection of that; I might perhaps refresh my memory in regard to it by looking up the condition of his account, and soon.

Q. Did Hoffman speak to you twice about borrowing money for the same occasion?

A. I should not say for the same occasion, but for the same reason.

Q. For the same reason?

A. You might mean occasion and might mean reason.

Q. The same date, same occurrence?

A. Not on the same day; there were two particular times when it was not clear whether he would get his money from the water committee; it was his custom the day he got his money from the water committee, when he got his estimates allowed and he knew he would get his voucher, for him to make a check, so that very often funds that he received from the water committee were drawn upon the same time that he received it.

Q. Then it was in regard to these two estimates that he received, or ought to have received, that he spoke to you on these two occasions?

A. Yes, sir.

Q. You say it was customary with Mr. Hoffman to get these accommodations from you in his general business?

A. Yes, he would get them at times; I don't think that in late years he was very much of a borrower for his bridge business; he had some matters with Mr. Willis that he had some notes along at times; but I looked yesterday at his individual account, and there was in September a balance there of \$15,000.00 to his credit.

[503] Q. To his credit? A. Yes, sir.

Q. His individual account, or his Hoffman & Bates' account? A. His individual account.

Q. How was his Hoffman & Bates' account?

A. Something about \$13,000 at the commencement of the month, and run down possibly to about \$11,000.00; I did not pay special attention, but I just run my fingers across the line.

Q. Hoffman kept you secured on his general running account for accommodations made him during the period that he did business with you? A. No, sir.

Q. I understood you to say so.

A. I said he had collateral in the bank; he had securities deposited in the bank, in an envelope, but they were never put up as collateral for his general account because he never had any privilege of overdrawing; when he wanted any money, he would ask for it, and I never required him to put up any security for any specific loan.

Q. I misunderstood you; I understood you to say that he had collateral for any loan that he might need.

A. If I said that I did not intend to; he had securities in the vault, but it was not put up as collateral.

Q. I understand that all that passed between Hoffman and yourself at this time that he thought he would fail to get his pay on the 20th or 21st of September, 1893, was that he come to you and asked if in default of getting that estimate you would advance him sufficient money to carry his payroll and other expenses at that time, and you told him you would do so, and that he went off and never returned to follow the matter up.

A. I do not recollect that he said anything about pay-rolls [504] or anything of that kind; he said his needs might be for money to take care of his payments, but I did not go into the question of detail of what his payments were.

Q. To make his general payments?

A. He asked me if he could have money in case he needed it; I said, "Yes, sir," but he did not come back to get the money; I think he got his money each month.

Q. Is it a fact what took place between you on the 20th of September, that Hoffman put a check with you for deposit to his credit for a very much larger amount than he had outstanding?

A. I don't know whether they were larger than he had outstanding; he deposited a large check, \$60,000.00.

Q. It was very much larger than the amount he drew against it in the next thirty days?

A. I could not say without looking.

Q. Did you examine his books to see the condition of his account after the 21st of September?

(Objected to as not cross-examination.)

A. No, sir, I did not look to see whether in the month of October there was any payments made to him; I don't recollect what his balance run in October; the only recollection that I have of his balance is in the month of September it continued the same without any particular variation; Hoffman & Bates' account was increased on the 21st of September by a deposit of \$66,000.00, and that same day I think he checked for about twenty odd thousand dollars.

Q. That is the account to which I call your attention now; [505] was not the Hoffman & Bates' account always a credit account with you after the 21st of September as long as this work continued?

(Objected to as not cross-examination.)

A. I don't think that Hoffman & Bates' account ever showed anything else than a credit account; I do not think they were ever overdrawn, because he never overdrew his account; if he needed money, it was his custom to come and ask for the money and give his note for it; so his account was never overdrawn.

Q. You never loaned him any money after the 21st of September on his note?

A. I have not looked to see.

Q. You did not look to see?

A. No, sir.

Redirect Examination.

Questions by MR. R. MALLORY:

Q. I will ask you this, Mr. Ladd: When you spoke of the panicky times, will you state what is the fact about the habit of banks making loans generally as they had been doing at a time prior to the panic?

(Objected to as immaterial.)

A. What do you mean?

Q. Whether you were not restricting your loans during that time?

(Same objection.)

A. We were.

Q. What was the fact about people being able to borrow money when they wanted it out of the banks during that time?

(Same objection.)

A. Well, we commenced to restrict our loans when W. S. Ladd, my father, died, in January, 1893, and we did not loan very much money that year, because both of us boys wanted to go on a vacation, and we did not want to do much business, and we did not loan very much; of course, after the panic commenced, we did not loan any more than was absolutely necessary.

Q. I will ask you whether or not it was not true in the commercial world generally, and among banks, particularly in Portland, it was exceedingly difficult from the time the panic began until the remainder of that year—it was very difficult for people to get loans out of banks.

[506] (Same objection.)

A. Yes, sir, I think it was.

Witness excused.

WM. HONEYMAN is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. Mr. Honeyman, state your name, age, residence, and occupation.

A. William Honeyman; age, 55; residence, 193 King Street, Portland, Oregon; occupation, hardware merchant.

- [507] Q. With whom are you connected?
A. Honeyman, De Harte & Co.
Q. What is your relation to that business—are you general manager? A. Yes.
Q. Is Honeyman, De Harte & Co. a corporation or a partnership? A. It is a corporation.
Q. Are you the president?
A. No, Mr. De Harte is president; I am vice-president.
Q. And manager. A. And manager.
Q. Were you acquainted with Mr. Lee Hoffman in his lifetime? A. I was; yes, sir.
Q. Did you know of his having been awarded the contract to manufacture and lay steel pipe for conducting the water from Bull Run to Mt. Tabor? A. Yes, sir.
Q. I will ask you if in the month of March, 1893, Mr. Hoffman spoke to you about signing as surety the bond that he was required to give to the city of Portland on account of this contract?
(Objected to as immaterial.)
A. I cannot say in the month of March, but he did in 1893 ask me to be surety on that contract. My impression, however, is that it was much later than March, still I may be wrong.
Q. Do you remember whether it was shortly after the contract was let?
A. It was shortly after the contract was let.
Q. The contract was let about the 5th or 6th of March.
A. Then it was in March. I remember I went down to San Francisco and it was cold. I remember there was snow going through the Siskiyou.
Q. I will ask you if you signed the bond.
[508] A. No, I did not.

Cross-Examination.

Questions by MR. L. B. COX:

- Q. Do you know of anybody else who did not sign it, Mr. Honeyman?
A. No, sir. Do I know of anybody who did not sign it?
Q. Yes.
A. Yes, I know lots of people that did not sign it.
Witness excused.

Thereupon the taking of testimony herein is adjourned until January 27th, 1896, at 10 A. M.

(Signed)

GEO. A. BRODIE,
Examiner.

Office of G. A. Brodie, Examiner, Portland, Oregon.

January 27, 1896, ten o'clock A. M.

At this time, pursuant to adjournment, appear the parties herein, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory of counsel, and thereupon the following proceedings were had, to-wit:

[E09] P. L. WILLIS is recalled as a witness for the defendant.

Direct Examination.

Questions by MR. MALLORY:

Q. State your name, age, residence, and occupation.

A. P. L. Willis; age, 57; Portland, Oregon; lawyer.

Q. Were you acquainted with Lee Hoffman in his lifetime?

A. I was.

Q. Do you remember on what day he died?

A. He died on the 24th day of July, 1895.

Q. Had you any business relations with Mr. Hoffman during his lifetime?

A. I did. I was attorney for Mr. Hoffman for a number of years.

Q. Were you his attorney prior to, at the time, and after the contract was let to him by the water committee of the city of Portland for the manufacture and laying of the pipe for conducting Bull Run water from Bull Run to Mount Tabor?

A. I was.

Q. Did you have any conversation with Mr. Hoffman concerning the matter of preparing estimates for bids for that work?

(Objected to as immaterial and incompetent.)

A. I did.

Q. Did you have any such conversation during the time that the bids were being prepared?

(Same objection.)

A. I did.

Q. Did you have any such conversation after the bids were prepared, as to the manner of conducting the work?

[510] (Objected to as incompetent.)

A. I do not know as I exactly understand the question. I talked with Mr. Hoffman freely and fully about the matter.

Q. I will ask you now to state what, if anything, Mr. Hoffman said to you in regard to the preparation of estimates and about making up bids on the work of conducting Bull Run water to Portland—the bids I referred to was upon estimates presented by the water committee for the purpose of having the work constructed.

(Objected to as immaterial and incompetent.)

A. He talked with me very fully about those matters at the time he said that the work was divided up by the committee into classes, and bids were to be received upon these classes separately, that he and Mr. McMullen proposed to get the work if they could, that they were both to submit bids on these various classes, but that it made no difference to which the work should be let; it was to be done by them together; that some of his bids were below those of Mr. McMullen and some of Mr. McMullen's were below his; the understanding was that if there should be no intervening bid between that of Mr. McMullen and Mr. Hoffman upon any particular class of work, the lower bidder would, if practicable, stand out of the way, and let the higher bidder take it—the parties bidding to get the contract at as high a figure as they could. Mr. Hoffman's bid was submitted in the firm name of Hoffman & Bates, under which he was doing business, and Mr. McMullen's was to be submitted in the name of the San Francisco Bridge Company, of which he was manager. The bids, as he stated to me, were arranged in that way with that understanding and were so put in. The whole work, I think, that was [511] awarded to them was awarded on one of Hoffman's bids; I think that when McMullen's bids were below Hoffman's there were other bidders below him.

Q. What, if anything, did he say as to their showing to each other their bid, and knowing the contents of each of them?

(Same objection.)

A. The bids were fully known to both; they were practically made up by both. The bid that was put in in Hoffman & Bates' name was really as much McMullen's bid as the one

put in in the name of the San Francisco Bridge Company; they were made up jointly between them.

Q. How about the San Francisco Bridge Company's bid?

A. It was the same in that respect as the other; Mr. Hoffman knew all about it. He told me in the beginning that Mr. McMullen's bid was lower and was raised at his suggestion, after conference with Mr. McMullen, and that there was one estimate on one portion of his bid which was raised at the instance of Mr. McMullen after consultation, my impression is, some \$13,000.00 on some class of work that Mr. McMullen thought that Mr. Hoffman had figured lower than was necessary, but the bids were all understood by both of them and mutually agreed upon.

Q. Now, did you have any conversation with Mr. Hoffman about this matter after the bidding was over and after the [512] contract was awarded?

(Same objection.)

A. Yes, about the bidding; I do not recollect that I had any conversation after the award until about the time that this trouble arose between Mr. Hoffman and Mr. McMullen.

Q. What trouble do you refer to?

A. That which arose before the commencement of this suit—shortly before Hoffman's death.

Q. Now, did Mr. Hoffman tell you anything about how their bids were arrived at—the amounts of them were arrived at, and anything about the estimates they had and who made them?

(Same objection.)

A. The estimates of Mr. McMullen he understood, and so stated to me, were prepared by the engineer of the San Francisco Bridge Company, a Mr. Catt, and Hoffman & Bates' bid was prepared very largely by Mr. Bush, Hoffman & Bates' engineer. That was the original preparation; then they compared them together, and he and Mr. McMullen sealed them, as they thought advisable and best calculated to secure them a good contract.

Q. Now, Mr. Willis, did Mr. Hoffman tell you anything about the matter of procuring funds for carrying on this work?

(Same objection.)

A. Yes, Mr. Hoffman was very much troubled about means

[513] for carrying on the work. His contract was let only a few months before the financial depression which struck us in July, 1893, and immediately after which it appeared almost impossible to raise funds. He told me Mr. McMullen was unable to furnish any money towards the prosecution of this work, and he was very fearful that he would be unable to raise sufficient funds himself, and indeed at times told me that he did not believe he could do it at all, and he put forth strenuous efforts, he told me, and some of this I was cognizant of, besides what he told me. He had an account for labor performed on some railroad work on the Sound, quite a considerable sum due him, that was admitted by the company whom the work was for, and another considerable sum that he claimed for force or extra work that was questioned by the company, and he, in order to secure funds and money for the preparation of this work, took the money which the company admitted, and abandoned his claim as compensation for extra work; it was only on that condition that the company would pay any sum, and he abandoned this claim—I think it was some \$5,000.00—that he claimed for force work which he abandoned in order to obtain about the same sum of money as I recollect it, upon the undisputed claim. That was for the purpose of having it to use in the prosecution of this Bull Run contract.

Q. Did he say anything about any efforts being made by him to get Mr. McMullen to put up the money?

(Same objection.)

A. Yes, he said he had called upon Mr. McMullen—that is, by writing—and I am not certain but he met Mr. McMullen and talked with him about it, but at any rate he had written several times asking him to put up money, and explained to him the difficulty that Hoffman was experiencing in the matter of raising funds, and insisted upon Mr. McMullen putting up half the money.

Q. Did Mr. McMullen tell you how much, if any, money he had himself advanced?

[514] A. I think he told me how much he had advanced, but the exact figures I would not undertake to state; my recollection is about \$15,000.00 that he had put in, and that he had made preparations to raise about the like sum in addition, though he afterwards told me that he had made preparations to raise

more than he actually used. That was owing to the fact that at one time the water committee had failed to make sale of some bonds upon which they calculated to raise money, and Mr. Hoffman had been depending upon that same calculation, and they feared they were not going to be able to raise that money—the water committee was not—and if they did not, then Hoffman would be short a very considerable sum on the payment of his men, and for supplies which he had agreed to make, and he made those preparations, but after that time, rather unexpectedly to Mr. Hoffman and seemingly to the committee, the bonds were disposed of, and the money was supplied by the committee.

Q. State what you know, if anything, from what Mr. Hoffman told you, or otherwise, when he was first advised that the bonds had been sold from which the money was realized to pay his September bills.

(Counsel for the complainant objects to the question as far as it called for an answer based upon anything the witness' personal knowledge, as being incompetent.)

[515] A. Mr. Hoffman talked with me about that matter, the day before it was announced in public prints here that the bonds had been sold, and on that day, in his talk with me, he expressed regret that the water committee had declined to order the work stopped on account of their failure to get the money; he preferred the committee would order the work to be stopped until they could be assured of the money, and I am confident from his talk on that day that he did not know the money was coming from that source. The next day it was announced in the public prints—I saw it in the "Oregonian"—and immediately after I arrived at my office in the morning, Mr. Hoffman came in and was in great glee over the fact that the committee had disposed of the bonds, and that he would get the money from them to go on with the work.

Q. What, if anything, did you ever hear Mr. Hoffman say in regard to the furnishing of a bond required of him as a contractor which he was required to give the water committee for the performance of the contract.

(Objected to by counsel for complainant as incompetent.)

A. He said that Mr. McMullen was unacquainted here and could not furnish a bond, and that he would have to put up bonds.

Q. I believe you were one of the sureties yourself?

A. I understand so; that is, I have been on Mr. Hoffman's bonds in a good many instances, and I think I was on this bond for this work.

Cross-Examination.

Questions by MR. L. B. COX:

Q. You are acting as the legal adviser of the present defendant in this case, Mrs. Julia E. Hoffman, administratrix of the estate of Lee Hoffman, deceased?

[516] A. I am in some matters.

Q. You have charge of the probate matters pertaining to the estate, have you not? A. Yes, sir.

Q. And you had acted as counsel for Hoffman for a number of years prior to his death? A. Yes, sir.

Q. And were the legal adviser of Mr. Hoffman in matters connected with the controversy between himself and Mr. McMullen and himself prior to the commencement of this suit?

A. Yes, sir.

Q. When did the conversation or the several conversations which you have alluded to between Hoffman and yourself in regard to the preparation of these estimates and bids for the work let by the water committee for bringing Bull Run water here to Portland take place?

A. It must have taken place shortly prior to the letting of the contract in the latter part of the winter or early spring of 1893.

Q. How did Hoffman come to be conferring with you about the matter at that time?

A. Well, he was talking the matter over to me as a matter of business. He talked his business with me very freely, both in reference to that and other matters.

Q. Were you advising him in regard to these matters?

A. Not in reference to making the bid; he knew more about that than I did.

Q. Did not he ask your opinion as to whether or not the bids should be put in in the way that he said they proposed to put them in?

A. No, sir; he knew no more about that than I did.

[517] Q. He knew about the matter of making estimates and putting in bids, but did he ask you if he and McMullen could bid in the way that he told you that they proposed to put in

the bid, as you have testified of one putting in a low bid and another a higher bid, and then dropping the low bid, and trying to get the work on the higher bid?

A. I do not think he asked my advice on any matter of that kind.

Q. How did he happen to be telling you about it—just as he would be telling anybody else he might be talking to about that?

A. I do not think he would have told parties generally. He relied upon my keeping what he told me in such a manner as not to be injurious to him. I do not think he would have told this generally.

Q. Is it not a fact that Hoffman was talking with you in regard to these matters as his confidential legal adviser?

A. Not particularly with reference to these matters, yet he would not have probably have talked these matters to me if that relation had not existed between us.

Q. Now, Mr. Willis, do you say that Hoffman did not ask your advice in any of these matters during the time that he was talking with you in regard to them?

A. Do you mean as to the legal effect of them?

Q. Yes.

A. No, I do not think he ever did.

Q. Did you express any opinion upon the propriety of him and McMullen bidding in the way that he outlined that they proposed to bid?

A. No, sir; I do not think I ever did.

Q. And he did not ask you anything in regard to it?

[518] A. I think not.

Q. Did not Hoffman state to you, or did not you know at the time these conversations were being had, that the bidder on any class of this work was required to deposit a certified check for five per cent. of the amount of the bid with the water committee, and this check would be forfeited to the committee if the bidder failed to make good the bid that he had tendered in case it should prove the lowest?

A. I think that I talked with Hoffman about it.

Q. You talked with Hoffman about it?

A. Yes.

Q. Where was McMullen at this time?

A. I think that McMullen was in Portland part of this time.

Q. Do you know whether these bids had been made or agreed upon as you say they were, at the time you and Hoffman were talking?

A. We talked about them before they had been fully agreed upon; they were under consideration at the time that we were talking about them.

Q. Now, during the course of any of these conversations had the amount of the bids been agreed upon?

A. I think Mr. Hoffman told me as to the principal, if not all the items, the amounts that had been agreed upon before the bids were opened.

Q. Now, then, did Hoffman tell you what those amounts were? A. I think he did, yes.

Q. Now, will you state to us how you figure out or how Hoffman figured out that by dropping the low bid on any of 519] these classes of work and forfeiting the five per cent. check which was deposited and taking the job on the next higher bid, that Hoffman and McMullen would not have suffered a loss upon every single proposition advanced?

A. Mr. Hoffman's statement about that matter was to this effect: that they could generally get rid of a forfeiture of that kind on some pretext; if it should turn out that they could not get rid of the forfeiture, and the difference between the two bids was more than the forfeiture, they could still make a profit on it; if the forfeiture was likely to be exacted from them, and amounted to more than the difference, then they would take the lower bid.

Q. Then they were setting a trap for the committee to catch them coming or going on the bids, is that it?

A. Well, they were seeking to do the best they could for themselves.

Q. Did McMullen ever tell you that he proposed to do any of these things?

A. I do not think I ever talked with McMullen at all. I think he came with Mr. Hoffman into the office at the time they signed that contract, but I do not think I ever had any talk with Mr. McMullen about the bid.

Q. Mr. Hoffman conferred with you a good many times while these estimates were in preparation?

A. Well, a number of times; I could not say a good many; he was in my office nearly every day, and about every time he came in after this work arose he talked about it.

Q. And he told you about these schemes he had in his mind about the water committee?

A. He told me what I stated here.

[320] Q. Did you ever discountenance it?

A. I never said anything to him about that matter; those were matters that he understood thoroughly about, and I never assumed to advise him; he never asked any advice and I never offered it.

Q. Hoffman told you that he and McMullen were partners in what work they could get from the committee in bringing this water here?

A. He told me that they were operating together, and gave me the facts from which I drew the agreement between them that they signed.

Q. That agreement was drawn after the bids had been offered and the award had been made to Hoffman?

Q. Now, did Hoffman tell you what their bids, if you term them such, on the work of manufacturing and laying steel pipe from the head works to Mount Tabor, were, and the amount of each bid?

A. Yes, I am quite certain he told me that.

Q. Now, there was no design on the part of Hoffman to drop the low bid in that case, and to attempt to get it on the other bid, was there?

A. No, I think the idea of that matter was to put McMullen's bid so much above Hoffman's that there would be no likelihood of doing that, but it was to make out that Hoffman's bid was very low, that was the purpose of it. The difference between those two bids, if I recollect, was some \$50,000.00 or more.

Q. You understood that from Hoffman?

A. Yes, sir.

[521] Q. Then it was in regard to these other bids in which the San Francisco Bridge Company might be the lowest that the San Francisco Bridge Company was to drop out and let the bids go to Hoffman?

A. Yes. I am not certain but there were other branches of the work in which Hoffman might have been dropped. I am not certain on the smaller branches about the amount of their various bids; I knew at the time, but I do not recollect it now.

Q. But at all events, the bid of Hoffman for laying the steel pipe was to go to Hoffman; there was to be no drop on that?

A. That is my recollection, that McMullen's bid at that time was to be so high on that matter that they did not expect but what there would be intervening bids between the two.

Q. Mr. Hoffman very fully unfolded his scheme to you in regard to that matter, did he?

A. Pretty fully, he talked to me very fully.

Q. When McMullen was here in the city of Portland?

A. He was here part of the time; I am not quite certain about all the time.

Q. You never had any such conversation with McMullen, and he never unfolded any such devices to you?

A. No, sir; McMullen never advised with me about the matter at all.

Q. And during all the time that Hoffman was laying before you the scheme that he had in his mind, you did nothing to discountenance what he was proposing to do to the water committee?

A. No, sir.

[22] Q. You say this bid of Hoffman for laying of steel pipe belonged equally to Hoffman and McMullen?

A. I think so.

Q. Then the bid was made jointly as the result of their joint judgment?

A. That is my understanding.

Q. Now, you say that McMullen required Hoffman to lower his estimate upon one item about \$13,000.00?

A. No, to advance his estimate.

Q. Advance his estimate? A. Yes.

Q. Do you know what that item was?

A. I am not certain; my impression is that it was some of the cutting.

Q. The excavation?

A. The excavation, I think.

Q. Is it not a fact that they made a cut on the work?

A. Well, I cannot say certainly about that, Mr. Cox; my impression is, though, coming to think about it, that he claimed it was a reduction.

Q. Now, is it not a fact, Mr. Willis, and did not Hoffman

say to you that McMullen required him to reduce the excavation \$13,000.00 instead of advancing it?

A. They reduced Hoffman's and raised McMullen's, that is the way.

Q. Now, is it not a fact that Hoffman told you that McMullen was the low man all the way through, and constantly required Hoffman to cut the estimates on different things and to make this cut of \$13,000.00 on the excavation, which gave this contract to Hoffman?

[523] A. My impression is that that is substantially correct; that the cut of \$13,000.00 was what put the bid on that class below the next higher bid.

Q. Had it not been for McMullen's participation in the matter, the contract never would have gone to Hoffman?

A. Not unless he had reduced his figures, that is my recollection of it; he told me that his figures as he had prepared them were higher than the next higher bid.

Q. Now, what did Hoffman say to you about his requiring McMullen to raise his bid?

A. Hoffman's idea was that it would be better for their joint interest to have McMullen's bid put up considerable, the exact amount I do not recollect, but my impression is that it was some thirty or forty thousand dollars, possibly more.

Q. What do you mean by McMullen's bid?

A. The figures that he had prepared, as I understand it, to put in his bid.

Q. That he brought with him from San Francisco?

[524] A. Yes, I think Mr. McMullen brought the figures with him.

Q. And the figures that McMullen raised were those which he brought with him from San Francisco and which had been prepared by Catt as Hoffman informed you?

A. That was my understanding, yes.

Q. Now, these conversations in regard to these estimates and bids took place at and before the time the bids were put in?

A. These that I have just been speaking of; I had conversations with him afterwards.

Q. Now, when did the conversation about these money matters and the conversation about McMullen putting up his part, and the conversation about the money coming to Hoffman from the railroad company on Puget Sound, and the con-

versation about the amount of money that Hoffman had advanced, and the conversation about the preparations made to make or procure other moneys, and the conversation about the city selling its bonds, all take place?

A. During the year 1893.

Q. What time of the year?

A. They all took place between February and October, 1893.

Q. Is it not a fact that no one of them took place prior to July? A. That is not the fact.

Q. What did Hoffman talk with you about before July?

A. He talked with me about the money matter that was coming from the railroad work that he had done on Puget Sound; that was before July, and I think it is probable that some of the other matters took place—about the bond matter.

Q. I did not ask you about the bond matter.

A. Well?

Q. When was it he talked with you about the railroad matter on Puget Sound?

A. He talked with me about that sundry times.

Q. When was the first time?

25] A. I cannot give you the first date; I have no data myself that would furnish it.

Q. Can you approximate it?

A. Well, I think the first talk I had with him about that railway matter was in the winter preceding—perhaps in the latter part of 1892, or early part of 1893—and I then prepared some correspondence with the engineer with whom he was dealing—the chief engineer—in reference to that matter upon his statement of the fact in relation to his claim for this extra or force work, but it was later and possibly after the financial trouble in July. But I am inclined to think that it was before that that he told me he had concluded to forego his claim for this extra work, in order to get the money that was due him on the other work.

(Counsel for complainant having already entered a general objection to all matters which took place prior to the execution of "Complainant's Exhibit No. 1," on the direct examination of this witness, subject to the ruling of the Court upon the materiality and admissibility of such evidence, offered by the defendant, appertaining to such time, now desires to say and have it placed upon record that this cross-examination as

to all matters or conversations between Hoffman and this witness at subsequent times are also to be taken subject to the ruling of the Court, as to the competency of the direct evidence upon such matters.)

Q. Is it not a fact now, Mr. Willis, that Mr. Hoffman reached this conclusion in regard to the railway matter on Puget Sound without regard to anything which McMullen might have done or might not have done?

[526] A. I do not understand that to be so, according to his statements to me.

Q. You say that Hoffman spoke to you about this matter prior to the crash in July?

A. I think he did, yes, sir. I know he spoke to me about that matter.

Q. I am talking about the matter of foregoing his disputed claim for the sake of getting his allowed claim.

A. Yes, I am inclined to think that was prior to July; I am not certain of that.

Q. You are quite positive about that, are you?

A. Not particularly; it is a good while ago, and I did not charge my memory as to dates.

Q. Do you remember the time that active operations on the work commenced?

A. I could not give you that date.

Q. Assuming that was in June, was not the conversation Mr. Hoffman had with you in regard to this matter in connection with the amount of money that he was required to raise as his part of the partnership venture without regard to McMullen, when he first spoke to you about drawing this money upon the railroad?

A. No; I am quite certain this conversation with me was that he had to make that sacrifice on account of McMullen's failure to make his payment.

Q. Assuming that the first call that he made upon McMullen was in August, what do you say?

A. If his first call for money from McMullen was in August, I should say this conversation was after that, because I think he had called upon McMullen for money and [527] McMullen had failed to respond before he made this arrangement.

Q. Now, do you know when Hoffman got that money from Puget Sound? A. I do not.

Q. Who was that company over there?

A. There were two concerns; I am not certain which one it was he got this money from. There was the Great Northern, and I am not certain whether it was the Oregon Improvement Company or another concern, called the Port Townsend Southern, a road down on the west side of Puget Sound.

Q. It is one of these three companies?

A. One of those three companies.

Q. Did Mr. Hoffman tell you at any time when he was talking with you about his anticipated difficulty in raising money that he had gone to Mr. William M. Ladd, of the banking house of Ladd & Tilton in this city, and asked him if he would let him have such money as he needed in case he could not get money from the water committee, and Mr. Ladd told him he could get it?

A. I think Mr. Hoffman told me about speaking to Ladd about money, but he expressed his fear that the call might be greater than Ladd would be willing to put up; he had a fear whether his collateral would not give out before he got enough money. That Ladd would require Hoffman to put up collateral when he borrowed money, and Hoffman was fearful that he would be called upon to furnish more money than Ladd would be willing to put up.

Q. How do you know that Ladd would require him to furnish collateral?

28] A. I do not know, except that Hoffman told me that was his anticipation.

Q. What did he tell you about it?

A. Exactly what he told me I could not say, beyond in a general way what I have said, that he would be expected to put up collateral with Ladd when he borrowed money from him.

Q. That was just assumption on his part?

A. I think it was based upon what he had done before. I had borrowed money there with Mr. Hoffman, and we had put up collateral before.

Q. You had put up collateral? A. Yes.

Q. What time?

A. We borrowed \$25,000.00 there once; it must have been six or seven years ago, I guess.

Q. Then when Mr. Ladd testified the other day that he

had frequently loaned Hoffman money on his account, and had never required collateral from him, Mr. Ladd was mistaken?

A. Well, if he said that he must have meant Hoffman alone, for when Hoffman and I borrowed money there together, we had to put up collateral.

Q. Hoffman did not tell you about the conversation he had with Mr. Ladd in which Mr. Ladd told him that he would let him have such money as he required without any conditions?

A. No, Mr. Hoffman did not tell me that.

[529] Q. Now, was it before or after he had made this deal with one of these companies of whom you spoke that you think that he told you he had spoken to Ladd about this money?

A. My impression is that it was after he had made this deal. I think he had raised what money he could on his own resources, before the time that he told me that he had spoken to Ladd about it. I cannot be very positive about these dates, because I did not attempt to charge my mind with them.

Q. Do you undertake to be positive, Mr. Willis, in regard to any of these matters that you have recited as having come to you from Hoffman?

A. Oh, yes, I am very positive about a large part of them.

Q. Just state now what you are particularly positive about.

A. Well, I am positive about his statement to me about the arrangement between him and Mr. McMullen as to their relations to this bid, and how they were arranging it in order to get as good a contract as they could with the city, and I am positive that he told me that he abandoned this claim against some of those companies on the Sound in order to get money on the undisputed claim from them. In fact, nearly everything that I have stated here with reference to conversations are entirely clear to my mind.

Q. Everything except the dates?

A. No, not everything. Dates, of course, are more uncertain than other facts, because they are more likely to slip one's mind.

Q. When was it that Hoffman told you that he had advanced about \$15,000 of his own money?

[530] A. I think that was about the time that he was in sore distress lest the water committee would not succeed in selling their bonds in September.

Q. In September he was telling you that?

A. Yes.

Q. You say at one time the committee had failed to sell bonds; when was that?

A. I do not think I said the committee had failed to sell bonds.

Q. I understood you to make that statement—the first statement that you made in regard to the subject.

A. That was not what I intended to say; the fact is, as I recollect the statement made by Hoffman with reference to that matter was that they had made arrangements to sell some of the bonds, and there was a question whether it would be carried out or not—whether the proposed purchaser would furnish the money and pay for the bonds. That, as I recollect it, was in September, 1893, along about the middle or after the middle of September, that it was determined that they would a few days before they did sell the bonds, but prior to that time, it was pretty well understood that they would not, and that time was the time that Hoffman was in so much distress, as I have stated, about his inability to raise funds to meet the obligations that would mature against him for that month's work, I think, or possibly, for the preceding month's work. On the next day it turned out that the bond purchaser had succeeded in raising the money and the bonds were to be taken.

[531] Q. Now, was it not at that time, Mr. Willis, and was not that the only time you heard anything about the inability of the committee to sell bonds or the anticipated inability of the committee to sell bonds?

A. No, I heard that talked over not only by Hoffman but by others, frequently.

Q. I am talking about this monthly estimate—the September payment—was not that the only payment in regard to which there was anticipated any difficulty about the sale of bonds?

A. I do not recollect of any other, Mr. Cox; I know it was doubted immediately after the financial crisis in July whether they would be able to sell any bonds, and it was talked about on the street, and was talked about by Hoffman to me, and was talked of by others on account of the stringency in the money market.

Q. Now, do not you remember that sufficient bonds had been sold prior to September 5th to carry the work up to that time and that was the first time that any difficulty was anticipated?

A. My impression is that they had sold sufficient to carry them up to that time before the tumble.

Q. Now, it was at that time and in connection with that September estimate that Hoffman told you that he had furnished about \$15,000.00, and had made preparations to raise more money?

A. Yes, I think it was in connection with that.

Q. What were the preparations that he had made?

A. He had raised what money he could from his private resources, and he had spoken to Mr. Ladd about getting more and if there were any others I do not now recall—I do not recollect of any others.

Q. Now, do not you remember that this is the fact that all Hoffman did say to you about raising more money was that [532] he had applied to W. M. Ladd in order to know from him if he could get what money he might need for his September payment?

A. No, he told me of the efforts that he had made himself. He had spoken to me frequently about that.

Q. I am talking about the September payment; at that time was it not that he told you about having to raise that money and the condition he was in, and that he had spoken to Ladd about it?

A. At that particular time?

Q. Yes. A. I cannot say certainly.

Q. You do not recollect of anything else that he said, though?

A. At that particular time I could not say for certain that it was that particular time that he mentioned the Ladd matter; but I think it was about that time; I have got that impression chiefly from the fact that he was very much distressed about his possible inability to meet his obligations that would mature very soon on account of this work.

Q. Do you remember the day of the month on which that occurred? A. What occurred?

Q. This last conversation that you had with Hoffman.

A. No, I cannot give you the date of the month. I do not

know, Mr. Cox, that I understand just what conversation you refer to.

533] Q. I refer to the one that you had with him about the trouble that he anticipated in getting money for his September payment.

A. Before it was understood that the bonds were sold.

Q. That is before the day it was published in the papers?

A. It was before it was published in the papers that they were sold.

Q. You do not recollect the day of the month?

A. No, it was the middle or last of the month.

Q. Referring now to the matter of giving this bond you say that Hoffman said that McMullen was unacquainted here, and that it would devolve on Hoffman to give the bond—Hoffman did not express reluctance to giving it, did he?

A. Not that I recollect of.

Q. He did not lodge any complaint against McMullen at that time about not giving the bond or part of it?

A. Not to me.

Q. Did not he with perfect willingness procure the sureties on this bond, so far as you know?

A. So far as I know, yes.

Q. Is it not a fact that you volunteered to sign the bond?

A. No, that is not the fact; I never exerted myself to go on that bond.

Q. How did you come to sign it?

A. I was asked to sign it.

Q. Then, when Mr. Swigert testified that Mr. Hoffman stated to him that you volunteered to sign this bond, either Hoffman or Swigert are mistaken?

534] A. That depends upon what they understand by volunteered. There was no application on my part to sign the bond, when Mr. Hoffman asked me to go on the bond, I signed it, either one or both of them might call that volunteering; and if so, they would not be mistaken; but if they meant to say that I had hunted Hoffman up, and suggested to him that I would like to sign his bond, they are mistaken; I did not volunteer in that kind of a way.

Q. Mr. Swigert testified that Hoffman told him that he, Hoffman, had called at your office, and that he was in some distress about getting a surety on his bond; that he said that

he had got Bates, but he did not know where he was going to get another surety, and that you thereupon said to him that you would sign his bond, and that you thereupon signed it.

A. The exact circumstances of the signing I cannot now narrate, but that I did not seek an opportunity to sign the bond I am very positive, but I signed it willingly when asked by Hoffman. I have signed his bond before, and I felt confidence in his doing what he undertook to do.

Q. You knew that McMullen was interested in that work?

A. Yes, sir.

Q. You knew that McMullen and he were associated together, did you not? A. Yes.

Q. You knew that McMullen had considerable experience as a contractor, did you not?

A. I understood that McMullen had had considerable experience in the contracting business.

Q. And in this line of work? A. Yes.

[535] Q. Now, is it not a fact, Mr. Willis, that you relied to a very large degree upon Mr. McMullen's experience and aid in prosecution of this work when you signed the bond?

A. No, sir, that is not a fact, I depended upon Mr. Hoffman; I was more intimately acquainted with him a great deal than I was with Mr. McMullen.

Q. You did not count upon Mr. McMullen?

A. Not in that matter.

Q. You had done business with Mr. McMullen?

A. Yes.

Q. You were personally acquainted with him?

A. Yes, sir.

Q. Did not you know this was a business in which Hoffman had had absolutely no experience?

A. Well, that depends upon what you mean by your question; if you mean that he had never constructed any pipe line for conveying water, I would say yes; if you meant that he had never had any experience in contracting business, I would say no.

Q. I mean work of this character—Hoffman had never put any water plant before?

A. No, I do not think he ever put in any water plant.

Q. You knew that at the time you signed the bond?

A. At the time I signed the bond I did not know of his having put in any water plant.

Q. You did know at that time that McMullen was an experienced contractor and had done work of this character?

A. I did not know that Mr. McMullen had ever put in any water plant. I understood that he was an experienced general contractor.

Q. Do not you know, and were you not led to believe and understand from what Hoffman said to you, that it was Hoffman's skill and information and judgment which had secured this contract?

A. I understood, as I before stated, that it was Mr. McMullen's suggestion that the estimate on the excavating be reduced some \$13,000.00 or thereabouts, on Mr. Hoffman's bid that enabled them to get that contract.

Q. Is it not also true that you understood that McMullen was a sort of conservation force on the entire business, and that Hoffman was cutting McMullen down on the estimate until they reached this \$13,000.00 item—that McMullen had been the man who had figured under Hoffman in the calculations that had been made all the way through?

A. My understanding was that McMullen's figures were below Hoffman's.

Q. Now, then, at the time you signed this bond you knew that it was McMullen's calculations and McMullen's estimate and McMullen's judgment that had prepared the bid?

A. I understood what I have already stated; yes.

Q. Yet you set no store by McMullen when you agreed to sign the bond?

A. I knew Mr. McMullen's affairs had been in the hands of a receiver not a great while before. His business was wholly in California, and his details were wholly unknown to me, and I depend solely on Mr. Hoffman.

Q. How do you know Mr. McMullen's affairs were in the receiver's?

[537] A. It was stated so in the public print.

Q. Before this time. A. O. yes.

Q. Are you quite positive about that? A. Yes.

Q. You had frequently gone on Hoffman's bonds in other instances, had you not?

A. Yes, in other instances.

Q. And you had no hesitancy in going on the bond at this time.

A. No, sir; I thought Mr. Hoffman would do just what he had agreed to do.

Redirect Examination.

Questions by Mr. R. MALLORY:

Q. Did Mr. Hoffman tell you anything about Mr. McMullen desiring to put in a bid for this work of manufacturing and laying the pipe, plates, etc., at the estimates that he had brought with him made by Mr. Catt.

(Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.)

A. I do not know that Mr. Hoffman stated that Mr. McMullen wanted to put in that bid. Mr. Hoffman's statement to me was that Mr. McMullen brought this bid with him to be considered in connection with the estimates prepared by Hoffman, and that it was generally considered by the two, and the result was to be such as agreed as their joint consideration of the matter. I did not understand that Mr. McMullen insisted upon putting in any bid at all, unless it was agreeable to Hoffman, after consultation, or that Hoffman insisted upon putting in any bid, unless it was agreeable to Mr. McMullen, after consultation.

Witness excused.

HENRY FAILING is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. R. MALLORY:

Q. State your name, age, residence, and occupation.

A. Henry Failing; age, 62; Portland; bank officer.

Q. Are you a member of what is known as the Portland Water Committee? A. I am.

Q. What position do you hold in that committee?

A. Chairman of the committee.

Q. How long have you held that position?

A. Since its organization. I think in 1885.

Q. What were the means adopted by the water committee of the city of Portland for procuring funds to construct the pipe for conveying water from Bull Run to Portland?

A. By issuance of bonds authorized by the legislature.

Q. I will ask you whether after the month of July, 1893, you had any difficulty in disposing of those bonds for the purpose of raising money for that purpose?

[539] A. Yes, we had considerable difficulty.

Q. State the circumstances generally about that, if you will.

(Counsel for complainant object to all this evidence as being immaterial.)

A. We advertised for bonds, and my impression is on advertising we failed to get any bids.

Q. What was your experience in regard to selling bonds to meet bills that fell due on the 20th of September?

(For the sake of convenience it is agreed that all questions touching this subject are objected to, on the ground that the evidence is immaterial.)

A. We found it difficult to get bids. In response to the advertisements for bonds we had a proposition from N. W. Harris & Company.

Q. State the facts that occurred about it, Mr. Failing, without being interrogated.

A. I am not sure as to the date, but I think it was in August. After correspondence we got a proposition from N. W. Harris & Company to take a certain number of bonds provided they had an option running, I think, three or four months for a certain amount per month at the same price.

Q. Did you make any sale under that arrangement prior to the month of September?

A. I think we made a sale in August under that arrangement.

Q. What was your experience in the matter of making sales to meet payments due to the contractors on the pipe line for [540] bringing water from Bull Run to Portland for the month of September? State as fully as you can.

A. Under the arrangement I spoke of with Harris they had an option to take 100,000 on or before October the 1st. We were, of course, very solicitous that they should exercise this option and I pressed them very hard, and, after correspondence, on the 16th of September they notified me to send \$100,000 in bonds, and I sent them that afternoon with orders for

delivery to them in such sums as they might tender. They had in August taken a few bonds. I recollect their taking 12,000 at one time—I do not remember the amount; the bond market was very dull; there was not much demand for bonds and we had to effect these sales as we could.

Q. Do you remember when you were first informed that a bond sale had actually been made and the money would be forwarded sufficient to meet your September payments?

A. I learned on the 16th by telegram that they would exercise this option for the bonds payable on or before the 1st of October.

Q. When did you first learn when the money would be actually paid?

A. I did not know just when the money would be paid until I was notified of its having been paid.

Q. When was that?

A. On the 20th of September—on the afternoon of the 20th.

Q. Had you any assurance until then that the money would be paid before the 1st of October?

A. I had not.

[541] Q. Now, in the meantime had there been any action on the part of your committee in regard to the possibility of your not being able to sell bonds to make the payments in September?

(Objected to as incompetent.)

A. I am not sure that any express authority was given by the committee, but I think the committee authorized the drawing of warrants from what money we had at our disposal—whether on express authority or not, warrants were drawn for 30 per cent.

Q. What money had you at your disposal?

A. We had a little remaining of the money on the former month and the current receipts from water rates.

Q. Do you know about the amount?

A. I cannot tell; my impression is somewhere about \$30,000 or \$40,000.

Q. How did you apportion that among the contractors—what per cent?

A. Equally to all of them. It was either 30 per cent or 40 per cent; I think 30.

C. Now, for that amount you say warrants were drawn?

A. They were drawn on the day of the maturing of the contractors' pay.

Q. That was the 20th of September? A. Yes, sir.

Q. Well, what, if you know, was done with the checks so drawn?

A. The clerk can tell better. I do not know whether I had signed the warrants or not.

542] Q. They were warrants; I called them checks.

A. Yes, warrants on the treasury.

Q. Just state what was done in regard to the transaction, if you remember.

A. I cannot tell whether I signed those warrants or not. Now, Mr. Mallory, my memory is not clear on that. I think it was pretty near the end of the business of the day, probably nearly three o'clock, that I got a telegram from Chicago, and I took this telegram and went to the office of the water committee, and instructed the clerk to draw a warrant for the contractors for the full amount of their pay.

Q. What office did you go to?

A. The office of the water committee; the clerk's office.

Q. Do you know whether warrants were drawn for the full amount?

A. They were, and the contractors were advised by telephone to come and get their money.

Q. That was the first day that you knew certainly that the money would be paid on the 20th of September?

A. Yes, sir.

Q. Did you know Lee Hoffman in his lifetime?

A. Yes, sir.

Q. Mr. Hoffman was one of the contractors for doing that work?

A. Yes, sir, for laying the pipe line.

Q. He was the contractor for manufacturing and laying of the pipe line from the head works on Bull Run to Mt. Tabor?

A. Yes, sir.

543] Q. I will ask you if you ever gave him any notice or ever had any conversation with him in any way about having the money to meet his claim on the 20th of September.

A. I do not think I ever had any conversation with Mr. Hoffman upon the subject, unless it might have been when he was called in at the meeting of the water committee.

Q. I had in my mind the meeting when I asked you the question.

A. I never remember of having any private conversation with Mr. Hoffman on the subject.

Q. What was the fact about their having a meeting of the water committee at which he was called in and this subject discussed?

A. I think I called a special meeting and laid the matter before the committee, probably to know whether we would give these further options on the bonds; I am not sure whether it was at that meeting or not. It was suggested that Mr. Hoffman be called in and the difficulty of getting the money explained to him. We thought it but fairness to explain to him the position the committee was in. I do not know whether I said anything to him upon the subject. I think Mr. Dolph spoke to him.

Q. Did you hear what was said?

A. Mr. Hoffman said he thought the committee, if there was any question about their not having the money, ought to give him instructions to stop the work.

[544] Q. I will ask you to state as near as you remember what was said to Mr. Hoffman by Mr. Dolph in the way of the probability of having the money to meet the September payment. State as near as you can what was said to Mr. Hoffman.

A. I have no very distinct recollection as to what words were used; I only know that we told him the position just as I have described it to you now.

Q. How is that?

A. That we found it very difficult to place these bonds; that we had no assurance that they would be placed, and in answer to his talking about stopping the work I think he was told that it would be time enough when we failed on our contract that the payment did not mature until the 20th of the month, and the committee declined to give him any such order.

Q. You notified him of the uncertainty of getting his money?

A. Yes; I do not recollect the language, but it must have conformed to the circumstances as I have described them to you.

Q. Did you about that time, or about the 14th or 16th of

September, write a letter to Colonel Taylor in San Francisco on this subject? A. On the 16th?

Q. On the 16th.

A. Yes, the same day that I got the telegram from Harris.

Q. Have you that letter with you so you can refer to it?

A. I have a letter-press copy. That is not the letter book of the committee; this is my private correspondence. (Witness turns to a letter.)

A. (Con.) My reason for writing that letter was because I had been asked the month before by the Risdon Iron Works, 545] and received two or three telegrams from Tom Brown, cashier of the Bank of California, as to what assurance I could give that this money would be paid promptly. So to help him along and help him with his bankers, immediately after getting this dispatch from Chicago on the 16th I wrote him this letter: (Reads.)

"W. H. Taylor, San Francisco.

"Dear Sir: Referring to your letter of the 7th inst., which I acknowledged upon its receipt, I now beg to say that I have just received telegraphic advices that \$100,000 bonds will be taken and paid for on or before Oct. 1st. If they are paid for it will enable the committee to meet all of its obligations which will have matured on that date. I have sent the bonds forward to-day. I cannot, of course, make any guarantee that they will be paid for by the date named, but as they are very responsible people and have fulfilled all promises hitherto, I have no reason to doubt that the money will be forthcoming.

"I will telegraph to-day, and I did two or three days ago, about the necessity of having this money by the 20th. I think the bonds will be paid for before Oct. 1st. You are at liberty to use this letter with our friends and the Bank of California if there should be any need of doing so.

Yours respectfully,

"HENRY FAILING."

Q. At the time that letter was written you had no other assurance that the money would be paid than that these people had made good their promises before and taken the bonds when they agreed to? A. Yes, that is it.

46] Q. I think you have stated that your first intimation that the money had been actually paid was on the 20th?

A. Yes, sir. The telegram arrived at the telegraph office here in the afternoon about two o'clock and when I got to the office, I think about three o'clock, I found the telegram and I went over to the office of the water committee immediately.

Q. Did you have any conversation with Mr. Hoffman between the date of this letter and the date of your receiving the telegram that bonds had been sold—that is between the 16th and 20th of September?

A. Not to my recollection; I do not think I ever spoke to Mr. Hoffman about this work, except at that meeting and when he signed the contract, and once he came to me and complained bitterly about Colonel Smith. I do not recollect having any conversation in respect to the contract or upon any other subject except those I have mentioned.

Q. Do you know Mr. McMullen?

A. I do not, except I have seen him here.

Q. Did you know Mr. McMullen at the time the bids for this work for constructing this pipe line were opened?

A. Did I know him?

Q. Did you know Mr. McMullen at that time?

A. No, sir.

Q. Had you any knowledge or information at the time these bids were opened, or prior to that time, that Mr. Hoffman and Mr. McMullen were united in this purpose to bid on this work?

A. No, sir.

Q. Had no knowledge on that subject?

A. I had not. I never saw Mr. McMullen to know him until to-day, although I think I have seen his face.

[547] Q. The testimony in this case shows that there was before the committee a bid of Hoffman and Bates for manufacturing and laying the pipe of some \$465,000.00, and something over that, and another bid submitted by the San Francisco Bridge Company for \$514,000.00 and some odd dollars, and so there was also evidence that there were some five or six other bids. I will ask you if at that time you had any knowledge that the bid of the San Francisco Bridge Company, signed by McMullen was a mere sham simply put in for the sake of making a show.

A. No, sir.

Q. Now, was that bid with the others treated as being a bid in good faith?

A. It was treated by the committee in the same way. The bids were referred to the chief engineer for compilation. They were all treated alike.

Q. There was no knowledge on the part of yourself that there was anything about this bid any different from the other bids?

A. No, sir.

Q. It was accompanied by the usual certified check that was required by the advertisement for bids in the notification for bids?

A. I presume so; I do not recollect of any bids being thrown out as it would have been done if it had not been accompanied by a certified check, and I think it was considered with the other bids.

Q. I will ask you what was the condition of money matters here generally in Portland during the months of September and from July on for the remainder of that year.

A. Well, money was pretty tight, as we call it.

8] Q. What do you mean by being pretty tight?

A. Well, I mean it was pretty difficult at that time for a man to have to negotiate a loan unless he was a customer of a bank and the bank was under obligations to discount his favor, and by obligation I mean the ordinary obligation to loan money on good security to a depositor.

Cross-Examination.

Questions by Mr. COX:

Q. That difficulty prevailed not only at Portland, Mr. Failing, but at San Francisco and all over the United States, did it not?

A. Yes, I think in September, the time we are speaking of, that money was pretty tight all over the country.

Q. Your relation to other banks and with business generally would make you familiar with such matters throughout the country?

A. Yes. It was in response to either this letter that I wrote to Captain Taylor, or a dispatch in the month previous, he wrote me a letter thanking me for writing to his bank and said upon receipt of my dispatch the bank vault doors flew

open, and he was supplied what money he wanted. I suppose money was tight there also.

Q. What was the contract between Harris & Company and the water committee, and when was it made?

A. I cannot tell, Mr. Cox; I could probably ascertain if you want to know by reference to my letters.

Q. If you can do it I wish you would do so.

(Witness refers to the letter-book.)

[549] A. I do not appear to have anything here which will lead me to give the date that they first took these bonds. Mr. Dodge might be able to answer that; I can only say that we seem to have apparently drawn on them for \$50,000 bonds deliverable on the 5th of August on the 13th of July. You understand, Mr. Cox, that Harris & Company would make no contract for the payment of bonds on any particular date. We had to take them as they could place them, and in consideration of selling the bonds in July they were to take so many in August and so many in September and so many in October, and the September option was to be taken by October 1st, and on the 1st of August we telegraphed them that in consideration of their taking \$15,000 more bonds (that is, the week of the first of August), the committee would extend the option from the 5th to the 11th, inclusive, on the remaining \$35,000. That is, in consideration of their taking that before the time we extended the option on the \$35,000. They were to take \$50,000, but they broke down on that and asked if they would take \$15,000 right away if we would extend the option, and that was done. For that \$15,000 I had an inquiry myself and I suppose sent them a customer.

Mr. HULER, of San Francisco.—Q. Who were Harris & Company—purchasers or brokers?

A. Well, they were bond dealers.

Q. Brokers?

A. Well, they are brokers and dealers. Of course, they are supposed to be people of large capital, who have a certain amount of bonds and place them as they can.

Q. They were not buying these for permanent investment, however?

[550] A. No, I think not. It was difficult at that time to get people to carry these bonds, so I suppose they did not want to run

the risk so they took them as they could place them. On August the first, I wrote this letter confirming my telegram, and on August the 11th they seem to have accepted my further proposition. I have a telegram here (reads): "Telegram received. Proposition contained therein, bonds and draft for fifteen and twenty thousand dollars, respectively, go forward to Importers & Traders' National Bank to-day, two purchasers." This seems to have given an option changing the date. I do not know what change was made.

Q. Was that in regard to bonds for which payments were to be made on or before the 1st of October?

A. Yes, sir.

Q. I wish you would give us with particularity just what took place in regard to that issue.

A. This (referring to the letter) is an acknowledgment of their statement saying that they would push the bonds and accept the option on the first \$100,000 to be delivered at any time from September 5th to October 1st—will push sales. (Reads): "As I wrote before, please to push sales; we are somewhat in a dilemma about the portion of the work on our pipe line—amount due contractors on the 20th." This is under date of September 4th.

Q. Well, without going into details in regard to those matters, Mr. Failing, what I wanted to get at particularly was the nature of the option that you had with Harris touching the bonds which were to be delivered in September and upon the first of October; they did not have a contract that they would take \$100,000 of bonds in September and pay for them on or before the 1st of October?

551] A. They had an option to take them. We had no contract with them. They had an option to take them. We had no contract with them. They could take them or not just as they pleased.

Q. You had no information direct that they would take those bonds?

A. No. We did not have any confirmed contract until they sent this telegram on the 16th saying that they exercised that option and to send the \$100,000. Perhaps I am mistaken about that. I guess I am, because earlier in the month I think in this

letter that they exercised that option, and said that they would take \$100,000 of bonds by the 1st of October

Q. Now, when did you receive that information from Harris & Company?

A. That they would take this \$100,000 of bonds?

Q. Yes.,

A. On the 4th of September they say in their dispatch this: "We accept extension option next \$100,000 to October 1st; will push sales, etc."

Q. That was on the 4th of September?

A. Yes, we had their promise to take during the month.

Q. This \$100,000 of bonds and pay for them on or before the 1st of October? A. Yes.

Q. Then when you had your special meeting on the 7th of September, at which Mr. Hoffman was notified to be present, that information was before the committee? A. Yes, sir.

Q. And it was undoubtedly communicated to Mr. Hoffman, was it not?

[552] A. I do not know, but I suppose we described to him the condition.

Q. Now, is not this the situation-- that the question was not whether you would sell those \$100,000 of bonds during September, but the question was whether you would realize on them by the 20th so as to be able to pay estimates at that time

A. Yes.

Q. The question was whether you would get the money on the 20th of September or the 1st of October?

A. Yes, provided Harris exercised this option, but, as I have stated before, in August they took part of them, but they broke down and they asked for an extension, and asked if they would take \$10,000 or \$15,000 whether we would give them an extension, so we could not tell how much we could get from them.

Q. Still, you had reason to believe, and did believe, that you would get that \$100,000, did you not, before the 1st of October? A. Yes, I think so.

Q. You knew that to be a reasonable belief?

A. Yes, sir. It was a very critical time, of course, and we did not know what would happen. From this quotation in this letter which I read I knew it was a very critical condition of

affairs and they had asked for an extension of time in consideration of sending us \$15,000, and we did not know whether they would be able to take these bonds before October 1st or at any later date.

Q. That is, they might not.

A. Yes, they had failed before, and of course we did not know and we could not tell, just as I wrote Captain Taylor.

Q. At the same time when this special meeting was held on 53] the 7th of September it was the understanding and expectation of yourself and the water committee that you would have \$100,000 in by the 1st of October?

A. I do not recollect anything being said on that subject.

Q. Do you say it was your understanding and expectation that you would have this money in during September?

(Question objected to as incompetent.)

A. I was hoping so; yes.

Q. Was not that communicated to Mr. Hoffman at the time he attended on this committee on the 7th of September that there was a doubt about getting his money on the 20th, but it was expected to be in by the 1st of October?

A. I cannot say that.

Q. Well, your understanding is that the exact situation was communicated to Mr. Hoffman?

A. I am quite sure the general situation was explained, but he may not have been told exactly the correspondence. There was some doubt about his getting his money on the 20th.

Q. Did you communicate with Mr. Hoffman by letter or messenger, or otherwise, at the time you sent your letter to the Risdon Iron works on the 16th of September in regard to the same matter?

A. No, I am quite sure I did not, because, as I have said, I have no recollection of having any conversation with Mr. Hoffman in regard to the matter.

Q. My question is whether you addressed him a letter similar to the one you addressed to the Risdon Iron Works and sent it by messenger.

54] A. No, sir; I have no recollection of sending him a letter by messenger.

Q. As a matter of fact the money did come in on the 20th of September, and these estimates were paid in full on the succeeding day.

A. Yes, sir; I think on the same day I signed the warrants—on the afternoon of the 20th.

Q. In the matter of taking these bids by the water committee, Mr. Failing, the committee was advised by its chief engineer, was it not, as to the probable cost of doing this work?

A. Yes. We had got an estimate.

Q. You had an engineer whom you felt satisfied was competent to advise you in regard to the matter?

A. Yes, sir.

Q. The work of making these cost estimates was referred to him and he made them, did he not?

A. Yes, sir.

Q. What did the committee do in regard to these bids when they were submitted to the committee and opened?

A. Referred them to the engineer.

Q. Now, is not that all the action the committee took on the bids when they were first opened?

A. That is my recollection. I think now that they authorized the contract to be entered into with the lowest bidder on the certificate of the engineer. I am not sure about that Mr. Cox; that was the usual method.

Q. It is a fact, is it not, that the committee had reserved the right to reject any and all bids without assigning cause?

[555] A. Yes, sir.

Q. You probably did not authorize any contract until you had heard from your engineer?

A. The records will show that.

Q. If there was anything of that sort done the records will show it?

A. If there was any authority given the chairman to execute a contract the records would show it. Of course a contract was entered into and I would not have done it without authority.

Q. The contract in question was entered into on the 10th of March, and the bids were opened on the first of March. Now, I will ask you this question Mr. Failing, whether the water committee, as a committee, ever undertook to make a comparative statement themselves of these bids that were submitted for the manufacture and laying of this pipe from the head works to Mt. Tabor.

A. Well, I do not know hardly how to answer that question in a direct way, but my impression is that that appears upon the computation made by the engineer.

Q. Then the committee was guided by the estimate of the engineer in regard to the proper cost of this work without regard to the amount specified in the bids that were received?

A. I do not know they were guided by the proposals.

Q. Well, let me put the question to you this way; if all these bids had been in excess of the engineer's estimate appreciably, the committee had the right, and would have exercised it, of disregarding all the bids?

[556] (Objected to by defendant as purely speculative and not cross-examination.)

A. I suppose if the bids according to the engineer's estimate were very exorbitant the committee would have rejected them.

Q. They had that power? A. Yes, sir.

Q. How, then, is it not a fact that the only bid which was given consideration by the committee to any extent whatever was the bid which was reported back by the engineer as being the lowest bid?

(Objected to as incompetent, immaterial and irrelevant and not cross-examination.)

A. Well, I do not know, Mr. Cox; I have an impression that the bids were considered. That is my impression. I am not sure, but it took a pretty close computation to decide.

Q. Close computation?

A. Computation, yes, sir; considering the kind of work that they were pretty close together. That is the impression that I have. I am not able to testify to the facts, it is so long ago.

Q. Now, do not you remember this much, Mr. Failing, that a tabulated statement of all these bids was prepared and published?

A. I know it was prepared; I do not know whether it was published.

Q. I show you a published schedule of bids; did you see anything of that character?

(Objected to as incompetent, immaterial and irrelevant and not cross-examination.)

(Handing witness a public document purporting to be a tabulated statement of bids.)

[557] A. Yes, I think I recollect seeing this, but the report of the engineer to me was in writing.

Q. On the bids? A. Yes, sir.

Q. Now, what I want to get at is just this: you never saw that until after the engineer had returned his report, did you?

A. I did not.

Q. You think not? A. I think not.

Q. Now, is it not a fact that the engineer took these bids when they were referred to him as you have testified, and that he went over the ground and reported to the committee the party who was the lowest bidder on each class of work for which proposals had been submitted, and the amount of his bid?

(Counsel for defendant objects to the answers as immaterial and not cross-examination, and objects to all the questions that have been propounded to the witness on that subject upon the same ground.)

A. I think that is the fact.

Q. And the engineer did not make such a comprehensive statement in the first instance as that embodied in the publication?

(Counsel objects to the question as immaterial, incompetent and irrelevant, and not cross-examination.)

A. I do not know.

Q. Now, is it not a fact that the committee acted upon the report of the engineer, who certified to the committee the lowest bidder, without any consideration on the part of the committee in regard to the other bids for the same class of work?

[558] (Objected to by counsel for defendant as incompetent, immaterial and irrelevant, and not cross-examination.)

A. I do not think that is the case, Mr. Cox.

Q. Will you explain, then, what the committee did do?

A. Well, I cannot state what occurred there, but I think it is a usual thing—I have always done it when bids for bonds or any other matter are received—I generally have my pencil by me and I put down the bids as they are read, and I read them myself and put down the price, and I have a general idea in my mind who is the lowest bidder. Where there was different classes of work and bid on in different shape, as, for instance, if some would bid a lump sum and another would bid so much a yard, I would have to make an estimate to get the

approximate cost. I do not know whether anything of that kind occurred or not. I certainly do not think the committee, regardless of what the other bids were, awarded the work to Hoffman & Bates without being satisfied in some way that their bid was the lowest. I never saw any such evidence of carelessness as that.

Q. Now, in making your annotation in regard to the schedule of bids you must have made it from something that satisfied your mind? A. Yes.

Q. And it needed no computation to determine whether the lowest bid was a good bid? A. No.

Q. You looked to the advice of your engineer, did you not, to determine whether the lowest bid was a proper one?

A. That is, a reasonable bid?

Q. No, whether it was a good bid for the work according to the cost price of the work. A. Yes.

[559] Q. And you simply took these figures down yourself to determine whether or not the engineer's report agreed with your own notation of what had taken place?

A. Yes, sir.

Q. You did not, Mr. Failing, for the purpose of determining whether the bid submitted in the name of Hoffman and Bates was a reasonable bid as to the cost of doing this work, compare it with the bids of the San Francisco Bridge Company or with other bids, did you?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

A. As to whether it was a reasonable cost or not?

Q. Yes.

(Same objection.)

A. I do not recollect just who the bidders were, but whoever they were they were taken down and I examined the gross sum of the work, and saw it and how it stood relatively, and which was the lowest.

Q. You have not quite answered my question.

(The question beginning, "You did not, Mr. Failing, for the purpose of determining etc.," was read to the witness by the examiner.)

A. I do not think I did.

Q. Now, I will ask you, Mr. Failing, if you were in any degree influenced as to the propriety of accepting the bid of Hoff-

man & Bates by the fact of the bid that was put in by the San Francisco Bridge Company, or in any other name, for the manufacture and laying of this steel pipe?

(Objected to as incompetent, immaterial and irrelevant, and not cross-examination.)

[560] A. No, I do not think it had the slightest influence with me. I did not know who the San Francisco Bridge Company were

Q. Then the fact is that you did not, so far as you were concerned, undertake to determine on the merits anything about any of these bids when they were first submitted and opened by the water committee? A. No.

Q. The bids were opened, listed and referred to the engineer? A. Yes.

Q. And the engineer made up his report as to the lowest bidder, and upon the submission of the engineer's report the award was made?

(These questions are all objected to by counsel for defendant as immaterial, incompetent and irrelevant, and not cross-examination.)

A. I think that is correct.

Q. Do you remember now, Mr. Failing, what the bid of the San Francisco Bridge Company, or of any other bidder except Hoffman and Bates, was on the manufacturing and laying of steel pipe? A. No, sir.

Q. Did it make any impression upon your mind whatever?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

A. No. I cannot remember.

Q. I wish you would state who were the members of the water committee on the 1st of March, 1893, if you can do so.

A. I do not know whether I can repeat all their names, but I can a part of them.

Q. Give as many as you can easily call to mind.

[561] A. Mr. C. H. Lewis, C. A. Dolph, J. Lowenberg, H. W. Corbett, R. B. Rapp, Mr. C. H. Hill—I think he was a member then—and C. H. Rafferty.

Q. Mr. S. G. Reed was one, was he not? A. Yes, sir.

Q. Now, I will ask you, Mr. Failing, if these gentlemen were not all gentlemen of large and varied business experience.

(Question objected to as immaterial and not cross-examination.)

A. I think so—as a class they were.

Q. You understood and they understood, so far as you know, did you not, from what transpired between them and yourself, that the committee was protecting itself on this matter of bidding, and was looking out for its interest, and expected the contractors to look out for their interests?

(Question objected to by counsel for defendant on the ground that it is immaterial, incompetent and irrelevant, and not cross-examination.)

A. The committee was trying to protect the interests of the city in every respect.

Q. And you expected the people who were submitting these bids to take care of themselves?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

A. Yes, sir.

Redirect Examination.

Questions by Mr. R. MALLORY:

Q. Mr. Failing, I want to ask you something concerning [562] this acceptance of the option referred to as having been made on the 4th of September; as I understand it, Harris had an option from the committee to buy certain of these bonds each month? A. Yes.

Q. Under the original arrangement he had to purchase them by the 20th of each month so as to furnish you the money by that time, did he not?

A. No, I think not. I think the dates were different. This is evident from the extension of this option if he took so many more in August. I have not the correspondence which will show that, but I think it is a fair deduction from this correspondence that I have that he could not meet the former option and asked us to extend it to October 1st in consideration of his paying so much in August.

Q. Now, what option do you refer to?

A. The option of the 4th of September.

Q. And to extend it to the 1st of October?

A. That was the money that we should get by the 20th of September.

Q. When should it have been paid if paid according to the original understanding?

A. I would have to look that up; I cannot state.

Q. Was not this extension of the option on the 4th of September a mere extension to them of the right to take the bonds by the 1st of October? A. Certainly.

Q. Then when you extended that option that was not in any sense an actual sale of the bonds?

A. No, that option was not exercised.

Q. I understood from Mr. Cox, and I think Mr. Cox so understood from what you said, that it was an absolute sale.

A. Let me see the language of this letter. (Witness examines his letter book.)

A. (Con.) I do not see anything in this letter to make it a firm proposition that they were to take the \$100,000. Of course, they say they will accept the extension of the option on the next \$100,000 and will push sales to October 1st.

Q. Now, I understand from the form in which Mr. Cox put his questions and the way in which you answered them that there was an actual sale of \$100,000 of bonds, and that the money was sure to come on the 1st of October; did you mean to say that?

A. I did think probably I did give currency to that idea, but I do not think it is justified by what I see in this letter.

Q. Now, then, was the letter of September 4th or the dispatch of September 4th anything more than a statement that they would still take the bonds if they could do so, or if they chose to do so by the 1st of October under that agreement?

A. Yes, sir, that was it.

Q. So when Mr. Hoffman was before the committee on the 7th of September the only thing that you could have communicated to him on that subject was that these people had had their option extended to the 1st of October, and might decide to take the bonds?

(Question objected to as leading.)

A. That was all that could have been said, yes.

Q. I will just ask you if you can state from memory when you made this first contract with Harris.

34] A. I cannot.

Q. Can you state within a month or two of what time it was?

A. There cannot be any mistake about that; the records will show.

Q. The records of what?

A. The records of the water committee. I would not do anything unless it was expressly authorized by the committee, except this dispatch of September 2nd, and that was after consultation with some of the members of the committee.

Q. Can you state in a general way what was the nature of your agreement with Mr. Harris about the sale of these bonds?

(Question objected to as incompetent.)

A. My impression is that the first bonds they took were either in July or August, and they agreed to take so many bonds, I think \$100,000, and pay for them during certain months, provided they could have the option of some further bonds. These bonds were taken in October and November, and I think up to December. From time to time the market grew worse, and of course they had failed in selling them. They had agreed to take some, and it was postponed in consideration of their taking \$10,000 or \$15,000. It was postponed until the next month, and that was one of the reasons why we had no assurance that that might not be repeated in September.

Q. The explanation of the option, as I understand you, is this: that they had an option to take so many bonds within a given time, and if they did not exercise that option within that time then they could not get the bonds; that you had disregarded their agreement; suppose they had agreed to take \$100,000 of bonds by the 5th of September—now, if they did not take those bonds by the 5th of September you would not be obliged to sell them the bonds, but might sell them to somebody else?

A. Yes.

Q. Now, the object of this extension on their part was to hold the option so they could take the bonds by the 1st of October.

A. Yes, sir.

Q. That was the purpose of the extension?

A. Yes, sir.

Q. What I want to know is, whether the extension of the

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option as suggested in the dispatch that you have just read, and which you say was confirmed by the committee, did anything more than extend to them the option to take the \$100,000 in bonds that they should have taken by the 5th of September to the 1st of October.

A. They had no confirmed contract on any of these bonds. They had the option to take them or not, but on the 16th of September, when they telegraphed us to ship those bonds, we supposed that was an exercise of that option.

Q. But up to that time you did not suppose there had been any exercise of the option?

A. No, or else we would not have had this talk with Mr. Hoffman, and we would not have been on nettles ourselves.

Q. Then at the time Mr. Hoffman was before the committee, on the 7th of September, you did not know and the committee did not at that time know or understand that they had made sale of any bonds, so that you could be sure that the money would be paid by the 1st of October.

[566] (Question objected to as leading.)

A. No, sir.

Q. I think you have stated further that when Mr. Hoffman was before the committee you knew this money would be paid by the 1st of October; I think you did not answer the question.

(Question objected to as leading.)

A. Well, I think that I did say that, but I do not think the correspondence warrants that conclusion. I think the correspondence, in looking it over, shows that until we had received the dispatch of the 16th we had no such warrant to believe that we would get that money. As I told you, Mr. Cox, having kept their agreement pretty well, we thought they would do it by the 1st of October.

Q. The matter of extending that option on the 4th gave you no assurance that they would take the bonds—they still had the option and they would try to sell the bonds if they could?

(Question objected to as leading.)

A. Yes, that they would push sales; to show the nature of these transactions that the option was on their part to take the bonds or not, I wrote a letter in August to the Bank of California; (reads): "I have just received a telegram from the

Risdon Iron Works relative to the payments for material which they had to make on the 9th inst., and they wish me to give you some assurance that payment will be made on the 20th inst. I enclose copy of my reply, which I gave them the liberty to show. I think there will be more than 80 per cent [67] paid if the bonds are not taken." That is, for August. "I think the chances are reasonable that we will pay in full, although I cannot assure you of that fact." This was in August, and one reason why they had a warrant for asking an extension on that option to September was that in August they had anticipated the time beyond that. I see on August the 7th I telegraphed the Risdon Iron and Locomotive Works (reads): "Option on bonds deliverable east on the 18th extended from 5th to 11th inst." They wanted six days more to say whether they would exercise it or not.

Q. That is, whether they would take the bonds or not?

A. Yes, sir. (Reads): "Even if option not exercised will be prepared to pay all contractors 80 per cent, probably more. Show this to the bank."

Q. Mr. Cox, I think, undertook to make you say, Mr. Failing, by the form in which he put his question, that the committee received bids upon this work and handed them over to the engineer, who reported back to the committee which was the lowest bid, and the committee awarded the contract to the lowest bidder, and the committee took no interest in the matter but that you took down the amount of the bid just to see whether the engineer had made his figures right. Now, what is your best recollection as to what the committee did in regard to those bids?

(Counsel for complainant objects to the question, on the ground that it is a false assumption of facts not warranted by any interrogatory that was put to the witness, either directly or inferentially.)

A. I do not think Mr. Cox made me say that. I think that the committee followed out the usual course in obtaining and [568] disposing of the bids as I described in answer to Mr. Cox's interrogatory. I think that they were very solicitous that the work should be let at a proper price, and, as far as I know, the committee displayed as much interest in the matter as probably they would have done had it been their own.

Recross-Examination.

Questions by Mr. COX:

Q. Is it a fact, Mr. Failing, that the committee had an engineer at the time to advise them as to what was a proper price, and the committee relied on his advice?

A. I think to as great extent as the committee would naturally rely upon its engineer, or as any individual would on an estimate made by its own employee.

Q. You accepted this report and acted upon it, did not you?

A. I am not sure about the action of the committee—whether there was a reference to the engineer for tabulation.

Q. Would that be a matter of record? A. Yes, sir.

Q. Now, I think, Mr. Failing, we are in some confusion in regard to this Harris incident. In September, as I understand, the general arrangement with Harris was that he was to have an option covering three or four months, of which September was one, to take so many bonds and make payments for them on or about the 18th of the month in which the bonds were taken, and he was to advise the committee by the 5th of each month as to whether or not he would accept the option which had been tendered him, and on the 4th of September Harris advised you by telegram that he would close the option for \$100,000 of bonds to be delivered in September if the time of payment was extended from the 18th of September to the 1st of October; is not that the fact?

A. I do not know. I would have to go over this correspondence and look into it to see before I would be able to say that. I thought so at first, but now that my attention is called to what was done in August I have a little question about it.

Q. I will ask you to do this, Mr. Failing—to see if you can discover the correspondence with Harris relative to the bonds which were sold him in September, and couple that with the correspondence which you sent to him, so that we can have it in form of the record which took place between you and Harris in regard to this September transaction.

A. Yes. My impression is that the effect of this meeting at the time this matter was talked over with Mr. Hoffman on the 7th of September was that we understood here that Harris had until October the 1st to declare his option.

Q. How did Harris happen to wire you on the 4th of Sep-

September—

tember—was that in answer to any communication you had sent to him?

A. Yes, on the 2nd. That was the day before he had to notify us whether he would exercise his option or not.

Q. Now, under the standing arrangement with the water committee Harris was to inform you on or before the 5th of each month whether he would accept the option for that month? A. Yes.

Q. Then if he accepted the option pertaining to that month and so notified you on the 5th, it was incumbent on him under the terms of this general agreement to take these bonds and pay for them by the 18th also, was it not? A. Yes.

Q. Now, then, was not the effect of the communication made you from Harris on the 4th of September, anticipating by one day the time within which he was required to notify you under his general arrangement with the committee as to whether or not he would take the September bonds—to advise you that he would take these bonds for September, but wanted the time of payment extended from the 18th of September to the 1st of October at his option?

A. I do not think so, Mr. Cox, because it seems as though we had a meeting over that, and I do not think we would have had a meeting if that had been the case. It was simply a question whether we would give him that continuance.

Q. If you can discover this correspondence, Mr. Failing, I will ask you to do so, so you can throw more light on the question, if possible.

A. I will look over my correspondence to see if I can answer your question.

Witness excused.

71]

F. T. DODGE is recalled as a witness for the defendant.

Direct Examination.

Question by Mr. MALLORY:

Q. Mr. Dodge, you were present at the meeting on the 5th of September referred to by Mr. Failing? A. Yes, sir.

Q. I will ask you if you remember what were the terms of the contract between the water committee and Mr. Harris in regard to the sale of these bonds?

Mr. COX. Let me ask if the contract was in writing?

A. Yes.

Q. Mr. COX. I object to the question as incompetent.
(Question withdrawn.)

Q. I will ask you if you were present at that meeting?

A. I was.

Q. I will ask you if you remember anything that was said there to the effect that the money would be paid by the 1st of October, and if there was any contract by which they could get the money by the 1st of October?

A. I have no recollection of it.

Q. Now, when was the first time that you knew or were aware that the bonds had been sold and the money paid for the September payment?

A. On the 20th of September, about three o'clock.

[572] Q. Up to that time what steps had been taken looking to the payment of the bills that should fall due on the 20th?

A. Warrants had been drawn for 30 per cent of the amount due to the contractors. The money was divided pro rata by the committee and warrant drawn for each contractor—there were four of them—for 30 per cent of the amount due to each.

Q. Of whom Mr. Hoffman was one?

A. He was one.

Q. Were those warrants delivered?

A. They were not.

Q. And why not?

A. Because about three o'clock on the 20th Mr. Failing came into the water office and said, "Here is a telegram from Harris and Company"—pardon me, I do not recollect whether it was from Harris and Company or the bank, but he said, "Here is a telegram which will enable us to pay the full amount due to each contractor."

Q. At the time you were making out these warrants for the 30 per cent had you any information or understanding from Mr. Failing, or any one connected with the water committee, that the committee would be in funds on the 1st of October from the sale of bonds?

(Counsel for complainant objects to this testimony and all of it from this witness, on the ground that it is cumulative, the witness having already testified fully in regard to these matters.)

A. None whatever.

Q. When did you first notify Mr. Hoffman of the fact that the bonds had been sold and the money was on hand?

(Question objected to on the ground that it is cumulative, the witness having already testified in regard to this matter.)

3] A. On September 20th, about three o'clock, immediately after Mr. Failing received the telegram.

Q. Have you any knowledge in regard to the matters referred to by Mr. Failing as to the extension of this option and what it referred to—he referred to an option being extended to the 1st of October; what option was that, if you know?

A. My recollection is, according to the agreement he was to notify the committee on the 5th of each month whether or not he would take and pay for on the 18th of each month a certain sum in bonds. On the 4th of September he telegraphed asking an extension of the date from the 5th of September to the 1st of October.

Q. That was the date he was to declare his option?

A. That is my recollection.

Thereupon the further taking of testimony herein is adjourned until to-morrow, January 28th, 1896, at 10 o'clock A. M.

[Signed]

GEO. A. BRODIE,
Examiner.

Office of G. A. Brodie, Portland, Oregon.

January 28th, 1896, 10 o'clock, A. M.

At this time, pursuant to adjournment, appear the parties as before, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

4] F. T. DODGE resumes the stand.

Direct Examination (Continued).

Questions by Mr. MALLORY:

Q. Counsel for the defendant calls the witness' attention to a paper dated Portland, Oregon, January 8th, 1839, addressed to Frank T. Dodge, clerk of the water committee, Portland, Oregon, signed N. W. Harris & Company, by Mc-

Devitt, and a consent to the statement further down on the page by the water committee of the city of Portland, signed Henry Failing, chairman, F. T. Dodge, clerk, and I will ask you to state what that paper is.

A. It is the agreement between N. W. Harris & Company and the water committee of the city of Portland with reference to the purchase of water bonds.

Q. For bringing water from Bull Run to Portland?

A. Yes, sir.

(Counsel for defendant offers in evidence the paper last shown to the witness and the same is received and filed, marked "Defendant's Exhibit Z2," G. A. B., Ex.)

Q. I think you stated when you were called as a witness for the defendant in this case that at the meeting of the water committee on September 7th, 1893, Mr. Lee Hoffman was called in; this is referred to on page 301 of your book; I will ask you if you stated when you were before on the stand all that was stated or that your minutes show in regard to the communication between Mr. Hoffman and the committee at that time.

[575] A. I forget what I did say.

Q. I will ask you, then, now to state what your minutes do show as to what occurred in that particular.

A. My minutes show that the meeting was called by Chairman Failing (reads): "He stated that his reason for calling the meeting was in order that the committee might consider their financial condition and decide about making more contracts." Then there are two paragraphs which do not refer to this business at all. (Reads): "After a general discussion of finances the committee voted not to let any contracts for the reservoirs at present, and the clerk was authorized to return the certified checks which accompanied the proposals. As nothing would have to be paid for the submerged pipes before next year, it was voted that proposals for these be referred to the construction committee for investigation and report. Mr. Lee Hoffman, one of the principal contractors, was invited into the room and informed fully as to the financial situation. After some discussion, on motion of Mr. Lewis, the committee adjourned."

Q. That is all that appears on that subject, is it?

A. Yes; then it is signed by Henry Failing, chairman, and Frank T. Dodge, clerk.

Q. Now, have you any recollection any more fully than that record contains of what was said to Mr. Lee Hoffman at that time?

A. My recollection is that he was informed that there was no certainty of the committee being able to make payments on the 20th of September according to contract, as there was no certainty about receiving money from the sale of bonds or for bonds offered for sale.

[576] No cross-examination.
Witness excused.

WILLIAM M. LADD is called as a witness for the defendant.

Direct Examination.

Questions by Mr. R. MALLORY:

Q. In the course of your examination, Mr. Ladd, when you were before the examiner the other day, you stated that you understood that the bonds that the water committee desired to sell for the purpose of raising money to meet their September payments were sold on the 16th of that month; I will ask you if you understood that from Mr. Hoffman.

A. No, sir.

Q. From what source did you get your impression or your understanding?

(Counsel for complainant objects to the question as immaterial.)

A. You told me the day you were there asking to look over the account of Mr. Hoffman in conversation then in regard to the amount of money which the water committee paid him in that month. I understood from you that the bonds were sold on the 16th of September.

Q. That was the understanding you referred to in your answer?

A. Yes, sir.

Q. Had you any understanding of the date of the sale prior to this time?

[577] (Counsel for complainant objects to the question as immaterial.)

A. No. I cannot recollect. I think I stated in my testimony the other day when Mr. Cox asked me if I could fix the date of the conversations with Mr. Hoffman that it must have been prior to the time that they anticipated the sale of the bonds, but I could not tell this date without ascertaining when the bonds were sold.

No cross-examination.

Witness excused.

RUFUS MALLORY is called as a witness for the defendant, and being first duly sworn, testified as follows:

My name is Rufus Mallory; I am 64 years old; my residence is Portland, Oregon; occupation, a lawyer. I am one of the attorneys for the defendant in this case.

[578] I desire to state, referring to what Mr. W. M. Ladd has stated in his testimony, that he understood from conversation he had with me the day he stated, or the day before he was called as a witness here, that the bonds of the water committee which was desired to be sold to raise the money to meet the September payments due the contractors for constructing the Bull Run pipe line had been sold on the 16th of September, 1893—I desire to say that in that conversation I said to Mr. Ladd that Mr. McMullen in his testimony had referred to a letter, which, as I remembered it, had been received in San Francisco on the 16th of September by Capt. Taylor, written by Mr. Failing, at Portland, I think, on the 15th, and that Mr. McMullen and his attorney claimed that that was evidence that the bonds had been sold prior to the 16th, and that they therefore argued that Mr. Hoffman must have known that the bonds were sold on the 16th, the day on which he wrote the letter to Mr. McMullen, in which he proposed to terminate the partnership between them unless Mr. McMullen put up \$10,000. I did not state to Mr. Ladd that the bonds had been sold on the 16th; I only referred to the conversation I have recited, and from this he drew the inference, as he said, the bonds had been so sold.

(Counsel for complainant moves to strike out all the testimony of the witness as above given, on the ground that the same is immaterial.)

No cross-examination.

Witness excused.

G. W. BATES is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. R. MALLORY:

Q. Where do you reside? A. Portland.

Q. What is your business?

A. Well, my business now is the banking business.

[579] Q. What has been your business heretofore?

A. Contracting business.

Q. How long did you follow the business of contracting, and where?

A. Well, I followed it here in Portland and vicinity for about nine years.

Q. What was the nature of your contract?

A. Bridge building principally.

Q. How extensive contracts were you in the habit of handling or did you handle?

A. Well, we have had considerable work; we built the Kennewick Bridge, and we built railroad bridges and highway bridges on the Coeur d'Alene branch of the Union Pacific—the branch from Tekoa to Mullen.

Q. What was the largest single contract that you had?

A. Well, I cannot tell you how much the largest was.

Q. Give us something near—approximate it.

A. Well, I guess it was about two hundred thousand dollars; I think something like that.

Q. Who was your partner?

A. Mr. Hoffman and Mr. Adler.

Q. You were acquainted with Mr. Hoffman in his lifetime?

A. Yes, sir; I was in business with him seven years.

Q. In the same business—contracting? A. Yes, sir.

Q. Do you know anything about the circumstances and conditions of this contract that he had for manufacturing and laying pipe for bringing Bull Run water to Mt. Tabor?

[580] A. Well, I do not know much about the details. I know of it in a general way only.

Q. Ever talked with Mr. Hoffman about it any?

A. Yes, sir.

Q. From whom did you ever learn of what he had to do with it?

(Objected to as incompetent.)

A. Well, I understood he was the contractor and manager of the contract, of course.

Q. For the whole contract?

A. Yes, sir.

Q. Did you ever have any conversation with him as to who furnished the money to do the work, or how it was paid by the city upon estimates?

(Same objection.)

A. Why, I understood that he furnished the money himself.

Q. Here was a contract which involved the amount of four hundred and sixty-five thousand dollars and a little more in the original contract, and there was other work done under it making the total amount something more than five hundred thousand dollars. Mr. Hoffman and Mr. McMullen were in partnership under an agreement that they should each furnish half the money to carry on the contract, and should share equally in the profits of losses thereof. Mr. Hoffman was to look after the work in Oregon, and Mr. McMullen was not to give it his attention and was not expected to. A bond for one hundred and forty thousand dollars was required by the city for assurance that the contract would be performed. This Mr. Hoffman had to furnish, Mr. McMullen not even signing the bond, or assuming any responsibility under it. Mr. McMullen had a [581] quantity, or the San Francisco Bridge Company had a quantity of plant, that had been in use in some contracts over on the Sound, at Seattle, consisting of camp, equipages, machinery for excavating, and a few horses which he furnished, of the value of somewhere from twelve to fifteen hundred dollars. He also, at the request of Mr. Hoffman, purchased, through his agents in New York, a hydraulic punch and a pair of shears for cutting iron, and at the request of Mr. Hoffman he also purchased, or rather ordered, in San Francisco some portable forges. He responded to whatever request Mr. Hoffman made of him in the progress of the work, in regard to employee and workmen, and provided tools for the work etc., but Mr. Hoffman had the entire control of the business, and all the responsibility attached to furnishing money to meet the bills that were due and all the liabilities which resulted from the ven-

ture. McMullen conducted his own business without reference to what was going on here. Mr. Hoffman, between the time the contract was let in March and the 1st of June, when the work of laying pipe actually began, had to make, and did in fact make, contracts for manufacturing the pipe, and he also had to make, and did make contracts for the hauling of the pipe from the place of manufacture to the place of its use. In the month of September, when his payroll and expenses would amount to something over twenty thousand dollars, he was notified by the city that there was no assurance that they would have any money to meet his bills on that occasion, and for the purpose of paying them and preparing to meet them, he made arrangements with parties to furnish him the money outside. He applied to Mr. McMullen to have Mr. McMullen 582] furnish his share of the money, which Mr. McMullen absolutely refused to do. Mr. Hoffman had, as I say, the whole care and responsibility of that work from the time the contract was awarded until it was completed in January, 1895. I will ask you to state, now, what in your judgment would be a fair and reasonable compensation for his services as manager of that work.

(Counsel for complainant objects to the question, on the ground that it presents an incorrect and incomplete statement of facts as shown by the evidence.)

A. Well, under the conditions, and I probably personally know a little more about it than there is stated in the question, I should judge a thousand dollars a month would not be any too much.

Q. From what you know yourself in connection with what I have stated.

A. Yes, sir; what I know personally besides.

Q. From what you know personally about it, what would you say would be a reasonable compensation?

(Same objection.)

A. The amount which I have stated.

Q. You were one of Mr. Hoffman's bondsmen, I believe?

A. Yes, sir.

Q. What do you know about Mr. Hoffman having any difficulty about getting his bond?

A. I do not think he had any difficulty, as far as I know.

Q. You do not know whether he had any difficulty in consequence of having to get the bond?

[583] A. No. He asked me if I would go on his bond, and I told him I would. I forget who the other party was.

Cross-Examination.

Questions by Mr. L. B. COX:

Q. You say you are a banker? A. Yes.

Q. What bank?

A. George W. Bates & Co., Albina.

Q. Mr. Bates, have you ever known of anyone occupying the position Mr. Hoffman occupied on this work—engaged in any similar work—during the time that you have been a contractor in the State of Oregon, getting anything like the salary which you say would be a fair salary to allow Mr. Hoffman for what he did. A. No, sir.

Q. What did you estimate your estimate on, then?

A. Simply on the responsibility of carrying on the work.

Q. You understood, of course, that Mr. Hoffman was a partner, and was to get a half interest in the proceeds of the job in addition to his salary?

A. I should judge so; yes, sir.

Q. Do you know of any other person occupying the position that Mr. Hoffman occupied in regard to this work who was ever allowed or paid one-half the amount that you say would be fair to allow Mr. Hoffman for his services?

A. Not personally; no, sir.

[584] Q. What is the largest salary you ever knew to be allowed or paid to a person occupying Mr. Hoffman's position in connection with this work—with reference to any similar position on any similar work?

A. Well, I do not know that I know of any.

Q. Do not know of any?

A. No, sir; I do not personally know of any.

Q. Now, of course, you were on very friendly terms with Mr. Hoffman during his lifetime? A. Yes, sir.

Q. On very friendly and intimate terms?

A. Yes, sir; I was associated with him in business for seven years.

Q. You went on his bond without any question?

A. Yes, sir.

Redirect Examination.

Questions by Mr. R. MALLORY:

Q. I want to ask you, Mr. Bates, if you, in all your experience, know of a case where a man occupied the same relation to a contract as Mr. Hoffman occupied to this? _____

A. No, sir.

Q. It was the peculiar condition that Mr. Hoffman occupied in this contract that makes you base your opinion upon as to the value of his services?

A. Yes, and having the whole responsibility for the payment of the men and all material.

Recross-Examination.

Questions by Mr. L. B. COX:

Q. It is on that assumption that you base your opinion?

A. Yes, sir.

[585]

Witness excused.

HENRY FAILING is recalled as a witness for the defendant.

Direct Examination.

Questions by Mr. R. MALLORY:

Q. You were asked when you were on the stand the other day to look among your correspondence to see if you could ascertain the exact condition of affairs between the water committee and Mr. Harris during the month of September; I will ask you if you have made such examination.

A. I have to the best of my ability.

Q. Will you now explain just what that situation was and all about this sale of these bonds for that month.

A. I think I can explain the apparent confusion in my own mind as to whether the option was to be exercised on a particular date or whether the bonds were to be paid for. When I was questioned by you and Mr. Cox, I was not sure as to when this contract was negotiated, and I think I stated that all this

was done in pursuance of a contract made sometime in July, for the sale of these bonds. It was two years and a half ago, and I had not looked carefully over the correspondence, and I had lost sight of the fact that during the month of September the original contract was modified and you might say a new [586] contract made. and when I stated, in answer to the first question, that the exercise of that option was on October 1st instead of September the 5th, I was correct; it was on an agreement for the extension of that portion to pay for those bonds. But subsequently, on the 13th of September, a proposition was made under which these bonds were agreed to be taken outright on October 1st, or by October 1st.

Q. Then the provision that you testified to having occurred on the 4th of September was a mere extension of the option?

A. Yes; under the contract as you have it, you will find that they were not bound to take any bonds, but they were to state on the 5th of the month whether they would exercise that option or not.

Q. Whether they would take the bonds that month or not?

A. Yes. When they could not see their way clear to do that they asked to extend that option to October 1st.

Q. That is the option?

A. Yes. The committee had no alternative, and I think the dispatch in which that was agreed to was read here in testimony; I think so. It was because of that, that on the 17th of September I called the committee together, and they were given to October 1st to say whether they would take any more bonds or not.

Q. That meeting of September 7th is the one that you called Mr. Hoffman before the committee?

A. Yes, sir. So the matter stood until the 13th. I have not the dispatch here, but it is copied in this letter. (Reads):

"Chicago, Sept. 13, 1893.

[587]

Henry Failing, Esq., Chairman Water Committee, Portland, Oregon.

Dear Sir: We telegraphed you on the 13th inst, as per enclosed copy as follows: We are finding it very hard to sell Portland water fives and get any premium for them at time when other bonds of similar grade are being sold for so much less. We have no orders for Portland Water bonds outside of one

hundred and fifty already paid for, a few of which we still have on hand unsold. Many offerings at ninety-nine of five per cent bonds of Eastern cities legal for Massachusetts savings banks make it necessary to meet the market to insure sales. Our N. W. Harris wires from Boston suggesting that in order that you may be sure of funds to meet your requirements that if you will make concession of $2\frac{1}{2}$ per cent off price of remaining bonds now under option to us making net cost to us ninety-seven one-half and interest, thus enabling us to compete with other bonds, and will extend to our unexpired options and deliveries for thirty days we will agree to take outright one hundred thousand before October first. Kindly wire reply, but please understand that if foregoing not accepted we shall go on and do all we can under present arrangement.

Your reply at hand this morning as follows: 'Your telegram received and proposition accepted. Important we should have as much and as quick as possible proceeds of one hundred [588] thousand to be taken outright before October first. Advise me about drawing or sending bonds, and as soon as possible telegraph me when payment may be expected.'

At present writing we expect to be able to wire in the course of a day or two (probably before this letter reached you) respecting the first additional shipment of bonds.

The above telegraphic correspondence is so full as not to require enlarging upon at this time. Considering the importance of the interests involved, your reply has come back to us quite as soon as we could expect, and we have to thank you for your promptness in this regard.

Yours truly,

N. W. HARRIS & CO."

Mr. Dodge has made memorandum in pencil at the bottom here (reads): "Read at meeting of committee September 19th, 1893. and action of chairman approved—Dodge."

Q. Now, then, in order that I may clearly understand you, I wish to put a question in this form; under the original contract Harris & Co. had an option to take bonds in any month, but must notify the committee on the 5th of the month that they would take the bonds for that month.

A. I think that was the terms of the contract, but I have not read the contract over lately.

Q. The option must be exercised by the 5th and paid for by the 18th? A. Yes.

Q. Now, on the 4th of September, you received a dispatch, as I understand you, indicating that they could not exercise [589] their option on the 5th and desired to have it extended until the 1st of October, and that option was in fact extended?

A. Yes, I have the dispatch here—that was on September 2nd that I sent that dispatch.

Q. Now, between the day that you received this dispatch asking for an extension of the option, and the 13th of September, the committee had no assurance that any bonds would be sold for that month, is that correct?

A. Yes. I do not know when the letter was written; the dispatch was sent on the 13th, and was received probably on the 14th.

Q. Up, then, to the 14th, the committee had no assurance that any bonds would be sold?

A. No, my reply was received in Chicago on the 15th.

Q. Then under their dispatch of the 13th you were then figuring that if you were to make a rebate of two and a half per cent below the par value of the bonds, they would take outright one hundred thousand dollars of bonds and pay for them by the 1st of October. A. Yes.

Q. The committee acceded to that request, and the bonds were to that extent sold? A. Yes.

Q. That information was communicated to them on the 15th?

A. On the 15th—at least I received it on the 15th. I have a copy of the dispatch here in my letter book. It is on the 15th. I have a letter that I received ordering us to ship the bonds; I have a copy of that letter that we wrote our correspondents in Chicago.

Q. I will ask you this question now, if you have had any conversation or communication with Mr. Hoffman after you received [590] this dispatch on the 13th and the 20th of September when the money was paid.

A. I think not. I have no recollection of ever talking with Mr. Hoffman anything about finances except at the meeting

of the water committee. But Captain Taylor depended upon me, as a friend, to do the best I could for him to help him get his money from the Bank of California, and I did not write to him until the afternoon of the 16th of September, when I got that dispatch, and I felt then that I was going to get that money sometime during the month.

Cross-Examination.

Questions by Mr. L. B. COX:

Q. Will you give us Harris' dispatch of the 2nd of September, Mr. Failing, please?

A. I have not got the dispatch; I have a letter of September the 1st, as follows (reads):

"Chicago, Sept. 1st, 1893.

"Henry Failing, Esq., Chairman Water Committee, Portland, Ore.

Dear Sir: We wired you yesterday as per enclosed copy, as follows:

"We agree take remainder third fifty thousand water bonds and pay for same on or before Monday, September eleventh, provided time to decide on next one hundred thousand extended from September fifth to October first for payment as sales [591] made on or before October first. We have favorable negotiations now pending covering all foregoing. Answer."

Your reply at hand as follows:

"Telegram received. Your proposition must be submitted to committee. Payment for remainder third fifty thousand on or before eleventh would answer, but the entire amount of next one hundred thousand will be required for contractors by twentieth September. Cannot you modify proposition and take certain amount from on or before eighteenth and also agree to take balance on or before October first, so that we can deal with contractors? I do not want to call committee together and present a proposition which they may not accede to and want to keep work progressing, if possible."

Yours truly,
N. W. HARRIS & CO."

That is my dispatch. I have the dispatch of September 2nd here; it is quoted in the letter of Sept. 2nd.

Q. Please read it.

A. (Reads): "Paid yesterday in New York for remainder third fifty Portland water bonds under option expiring yesterday; also paid twenty-five thousand to Portland Bridge Com. We desire favor water com., but unless our options can be extended cannot give encouragement taking more water bonds. We fear Portland officials fail appreciate condition eastern bond market. We are now urged to take under option to sell long Milwaukee and Long Omaha fives at par. Milwaukee bonds formerly sold three and three quarters interest [592] basis. If you will extend all unexpired options and deliveries thirty days, we will continue to push sales, giving you benefit proceeds rapidly as possible. Answer."

Q. Now, have you your answer to that dispatch of the 2nd?

A. Yes.

Q. Read it please.

A. (Reads): "Portland, Or., Sept. 2nd. N. W. Harris & Co., Chicago, Ill: Impossible to get committee together to-day; after consulting two or three members concluded to take responsibility of extending time from fifth inst. to October first on next one hundred thousand. Would prefer to consult full committee before extending remaining options and deliveries. We fully appreciate situation and your efforts. Wire me acknowledgment of this and state whether satisfactory.

HENRY FAILING,
Chairman."

Q. Will you read Harris' dispatch of September 4th, 1893?

A. (Reads): "Chicago, Sept. 4, 1893, Henry Failing, Portland: "Saturday's telegram just received this morning. Thomas (which was afterwards explained to mean thanks). We accept extension option next one hundred thousand from September fifth to October first, and will push sales best our ability leaving question further extensions should same be necessary for future consideration.

N. W. HARRIS & CO."

93] Then on September 8th they wrote the following letter to me (reads): Chicago, Sept. 8th, 1893. Henry Failing, Esq., Chairman Water Committee, Portland, Or. Dear Sir: Your letter of the 4th inst. at hand this morning and contents carefully noted. It is gratifying to us to be assured by extension of time as well as by your letter, that gentlemen like yourself and Mr. Corbett, and those associated with you, do appreciate the extraordinary financial conditions which are still so persistent in the East; and we desire to say that we think that we, in turn, in some measure, at least, understand the anxiety and desire of the water committee to be certain of the necessary funds to have the pipe laying go on without interruption to the end of the season. We shall bear it in mind as you suggest to notify you promptly of sales we may make, whether for delayed or immediate delivery, and note also that you will make deliveries on notification from us at any time and in any amount desired, in either Chicago or New York as we may request. Should we learn of anything which would seem likely to be of aid to you in shaping the policy of the committee towards the contractors, we will gladly communicate it to you promptly. Our Mr. N. W. Harris has recently gone east and will spend the next two weeks at our New York and Boston offices and we shall thus have the advantage of his counsel in the immediate field where bonds such as the Portland water bonds would in ordinary times find their principal lodging place, as well as the benefit of his experience, while in touch with the eastern monetary pulse, in forming an estimate as to the course of the market and financial affairs generally in the near future.

594] We thank you for laying before us so fully the problems immediately confronting the committee, and assure you we shall do our best to comply with your wishes.

Yours truly,
N. W. HARRIS & CO.

P. S.—By the way, the word which reached you from us by wire on the 4th inst. as "Thomas" was the operator's version of the word written at this end as "Thanks."

N. W. H. & Co.' ,

Witness excused.

The defendant here states that he rests.

Testimony for Complainant in Rebuttal.

PHILIP BEUHNER is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.**Questions by Mr. L. B. COX:**

Q. What is your occupation, Mr. Beuhner?

A. Contractor.

Q. With what concern?

A. Well, formerly with Wolff & Zwicker Iron Works.

Q. What now? A. Just myself alone now.

Q. When were you with the Wolff and Zwicker Iron Works?

[595] A. There as a partnership between the Wolff & Zwicker Iron Works and myself formed in March, 1893, I think.

Q. I will ask you to state if that concern had any contract with Lee Hoffman for manufacturing of steel pipe under a contract awarded to him by the city of Portland from the head works of the water system on Bull Run Creek to Mt. Taber.

(Counsel for complainant objected to the question, as immaterial and irrelevant.)

A. Yes, we had a contract for making the pipe.

Q. Where is that contract now?

A. I think it is downstairs now.

Q. In whose custody? A. Mr. Paxton's.

Q. Do you remember the amount of the contract?

(Counsel for defendant here enters a general objection to all this testimony concerning the contract with Wolff & Zwicker as immaterial and irrelevant.)

A. On the contract for manufacturing the pipe alone it amounted to, approximately, \$180,000.

Q. What time was that contract entered into? ;

A. It was entered into in March, 1893.

Q. How long did it last?

A. Well, until the contract was finished.

Q. You executed your contract for manufacturing the pipe?

A. Yes, we completed the pipe.

No cross-examination.

Witness excused.

[596] JOHN McMULLEN is recalled as a witness in his own behalf on rebuttal.

Direct Examination.

Questions by Mr. L. B. COX:

Q. I will ask you to state, if you know, what arrangement was made to do the work of hauling the pipe into position which was to be laid under the contract of Hoffman with the city of Portland.

(Counsel for defendant objects to the question as irrelevant and immaterial.)

A. There was a contract made with Cook and Kiernan to haul the pipe from east Portland and deliver it along the line at the trench.

Q. Was that contract carried out by them?

A. Yes, sir; that contract was carried out by them.

Q. Do you remember the amount of it?

A. Well, the aggregate amount of it was about \$36,000.

(It is understood that all this testimony is subject to the same objection made by defendant.)

No cross-examination.

[Signed]

J. McMULLEN

Witness excused.

ROBERT WAKEFIELD is called as a witness for the com-
[597] plaintant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation, Mr. Wakefield?

A. Contractor and builder.

Q. How long have you filled that position?

A. About six years.

Q. Whereabouts? A. In Portland.

Q. Did you know Lee Hoffman during his lifetime?

A. Yes, sir.

Q. Were you ever associated with him?

A. Yes, sir.

Q. In any business ventures? A. Yes, sir.

Q. Where?

A. Building for the Holladay Avenue sewer, and I was with him building the bridges on the Great Northern Railway.

(Counsel for complainant now desires it to be noted that the interrogatories propounded to this witness and all other evidence in rebuttal pertaining to matters which transpired between Hoffman and McMullen touching the work of bringing Bull Run water to Portland prior to the execution of "Complainant's Exhibit No. 1" are offered, subject to the ruling of the Court upon the evidence submitted by the defendant as to the materiality of such matters.)

[598] Q. Did you ever have any talk with Mr. Hoffman during his lifetime in regard to the procurement of the contract which was secured by him with the city of Portland for the manufacturing and laying of steel pipe in connection with McMullen's association with his? A. Yes, sir.

Q. I will ask you to state whether or not in the course of any of your conversations Mr. Hoffman said anything to you about how the contract had been secured.

A. Yes, sir.

Q. You may state what he did say.

A. He said that he would not have been in it only for McMullen, that is, the words he used, "He would not have been in it only for McMullen."

Q. Was anything said in regard to figures which had been made on the contract—estimates by one or the other of them?

A. Yes, sir.

Q. What did he say about that?

A. He said that McMullen made him come down between \$40,000 and \$50,000.

Q. You say that you were concerned with Mr. Hoffman in the bridges on the Great Northern? A. Yes, sir.

Q. What time was this?

A. The contract was signed July 30th, 1892. It was all arranged, I think, about thirty days previous to the formal signing of the contract, but Mr. Hoffman was in Alaska, which delayed the signing until his return.

Q. How long did it last?

A. I think it was finished in May or June, 1893. I should judge somewhere along there; I cannot tell exactly.

599] Q. Now, I will ask you to state, if you know, whether Mr. Hoffman had any other business at that time with the Great Northern? A. No, sir.

Q. Do you know whether he had any business with the Port Townsend & Southern Railroad?

A. He had none.

Q. Did he have any with the Oregon Improvement Company? A. No.

Q. In whose name did the contract with the Great Northern stand?

(Question objected to by counsel for defendant as immaterial.)

A. Hoffman and Bates and Wakefield.

(Counsel for defendant moves to strike out all the evidence of this witness touching his relations with the Great Northern Railroad as immaterial.)

Q. Who did you say the contract was with?

A. Hoffman and Bates and Robert Wakefield.

Q. That was yourself? A. Yes, sir.

Q. When, if you know, was settlement made with the Great Northern for the work which had been done under that contract—the final settlement?

(Objected to by counsel for defendant as immaterial and irrelevant.)

A. I do not know just when the final settlement was made. I disposed of my interest to Mr. Hoffman before that, and I do not know when it was made.

Q. When did you dispose of your interest to him?

(Objected to by counsel for defendant as immaterial and irrelevant.)

A. On the 13th of September, 1893.

600] Q. According to your knowledge had settlement been made with the Great Northern up to that time?

(Objected to by counsel for defendant as immaterial and irrelevant.)

A. I think not, unless it was made without my knowledge.

Q. I say to your knowledge had any settlement been made with the Great Northern prior to that time? A. No.

Q. How much was owing from the Great Northern on this contract at the time you made your settlement with Hoffman?

(Objected to by counsel for defendant as immaterial.)

A. Well, we claimed about \$12,000.

Q. Of what did that claim consist?

A. It consisted of, I think, about \$12,000 for a small bridge that we used and some bridges that had been washed out that they claimed they were not responsible for.

Q. Well, I will put it to you in another way—was there any agreement between yourself and Hoffman on the one side and the Great Northern on the other as to the amount of your claim?

(Question objected to by counsel for defendant as immaterial and irrelevant.)

A. Yes, sir.

Q. What proportion was in dispute?

A. Between \$4,000 and \$5,000.

Q. How much was allowed?

A. Well, I cannot say. After I sold out of course I took no further interest.

[601] Q. I mean while you were there; how much did you understand that they did not dispute?

A. There was \$12,000 altogether and between \$4,000 and \$5,000 in dispute, would leave about \$8,000, actually conceded.

Q. Now I will ask you if you know what those disputed items consisted of?

(Counsel for defendant objects to the question as immaterial and irrelevant.)

A. They consisted of a small drawbridge that we used, and there was one span that had been washed out that we claimed they were responsible for and they claimed we were.

Q. What amount was claimed for this drawbridge?

(Counsel for defendant objects to the question as immaterial.)

A. \$2,000 was the claim.

Q. What had been the cost and what was the value of that drawbridge?

(Counsel for defendant objects to the question as immaterial.)

A. Well, I put it into the firm when I went into the firm with Hoffman at \$500.

Q. What were the facts in regard to the loss of the span that went out—what took that out?

(Counsel for defendant objects to the question as immaterial.)

02] A. High water took it out. The company furnished the false work and the high water took it out, and we claimed that was the cause of the loss of the span, and they claimed we had plenty of time to have built it before the high water came, and that was the cause of the dispute.

(Counsel for defendant moves to strike out the answer of the witness as incompetent and immaterial.)

Q. What is the character of your work as contractor, Mr. Wakefield?

A. Well, almost all kinds of work.

Q. Enumerate some of the contracts you have had and been concerned in.

A. Well, I have done a good deal of work for the Union Pacific-- bridge building and trestle building, and I built the terminal depot here, and built the Cantalever bridge at Albany, Oregon, and built the bridge at Snohomish Slough.

Q. What is the amount of your contract for building the depot here?

(Counsel for defendant objects to the question as immaterial.)

A. It run about \$300,000.

Q. What was the amount of your contract with the Union Pacific that you had?

(Counsel for defendant objects to the question as immaterial.)

A. I suppose I did \$300,000 worth of work for them.

Q. Now had you any experience prior to that time as a contractor?

A. I used to work for the Union Pacific as superintendent of bridge building.

Q. For whom?

603] A. For the Union Pacific and the O. R. & N. Co. All my life has been spent in similar work, superintending contracts.

Q. You are acquainted with the condition prevailing at Portland, Oregon, and thereabouts in the year 1893 and 1894?

A. Yes, sir.

Q. Touching the cost of labor and the value of services and the financial situation? A. Yes, sir.

Q. In a greater or less degree of particularity, I presume?

A. Yes, sir.

Q. What was the financial situation during those two years commencing with July 1893?

A. It was very difficult to obtain money to do anything.

Q. What effect, if any, did that have on salaries and wages and things of that sort?

A. It caused a material reduction.

Q. I wish to ask you this question, Mr. Wakefield; Hoffman and McMullen went into copartnership March 6th, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667, and the contractor was required to furnish a bond in the sum of \$140,000, which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman and the other an attorney, who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of capital to the prosecution of the enterprise and they were to share equally in its profits and [604] losses. It was also agreed that Hoffman, being a resident of the city of Portland, should have the active superintendence of the work, but that McMullen who resided in San Francisco and controlled offices there and in New York and Seattle, should render all services required of him at these points. After the procurement of the contract with the city the work of manufacturing the pipe, amounting to an item of about \$180,000, was subcontracted, and the work of laying the pipe into position, amounting to a cost of about \$36,000 or thereabouts was also subcontracted, and both these contracts were carried out by the subcontractors. The work of laying the pipe in position and preparing for it by excavation, etc., was actually begun in June, 1893, and between March 10, 1893—the date of Hoffman's contract with the water committee—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, collecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle

and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendence of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of equipment, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20, 1893, Hoffman found two-thirds and McMullen one-third, the value of the latter estimated at from \$1,600 to \$2,300. Owing to his inexperience in such work Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made to him by Hoffman except in the matter of furnishing money until September 20, 1893. During this time an engineer and a superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20th, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned, but Hoffman advanced from his private means at various times in the months of June, July, and August, 1893, the sum of \$14,500, or thereabouts, which was covered by his estimate paid by the water committee on September 21st, 1893, and thereafter Hoffman did not have or need not have any money of his own in the job. Money was very tight and salaries and wages were affected thereby as you have testified. In the partnership contract between Hoffman and McMullen there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be a proper salary to Hoffman for services rendered by him over and above the services contributed by McMullen during the period of time between March 6th and September 20th, 1893?

(Counsel for defendant objects to the question as immaterial and incompetent, and that it is based upon facts not proven, and that it is not a correct statement of the conditions that prevailed at the time referred to, and that the witness is not competent to testify on the question.)

A. You mean me to answer from these facts that you have set forth, or from what I know of my own knowledge?

Q. From the facts as set forth.

A. As far as the money was concerned I would say that he ought to have 10 or 12 per cent for the use of the money.

(Counsel for defendant objects to the answer of the witness and moves to strike it out as incompetent, irrelevant, and immaterial.)

Q. Now, then give your opinion as to the value of his services upon all the facts that I have stated to you.

A. My impression is that he ought to have rendered those services as a partner in the concern.

(Counsel for defendant objects to the answer of the witness and moves to strike it out as not responsive to the question.)

Q. If a fair salary was to be paid, what, in your judgement, would be a fair salary?

A. If he was going to have a salary at all you could not very well afford to offer less than \$5,000 or \$6,000. That would be my judgment.

Q. In making that estimate, do you make any allowance for what McMullen was doing as offsetting what Hoffman was doing?

(Counsel for defendant object to the question as immaterial and irrelevant.)

A. No. it would be pretty hard to balance those two accounts. It is always rutable in such work as that for the two [607] partners to devote what time is necessary to the work. I make no deduction for what McMullen was doing.

(Counsel for defendant moves to strike out the answer of the witness as not responsive to the question.)

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. In the answer you gave in which you stated that in consequence of the financial crisis, which began about the 1st of July, money became scarce and hard to get and that the price of labor was materially reduced; do you mean by that to be understood that such service as was performed by Mr. Hoffman as manager of the work that I have been describing to you was materially reduced?

A. No, I do not think it would have affected that kind of work. I refer to just labor.

Q. Common labor? A. Common labor.

Q. Now, Mr. Wakefield, if you were estimating the value of services of a manager of a business like that on the ground and having full knowledge of the situation of affairs and entire control of it—in fixing the value of his services would you not take into account at all what his partner might have been doing somewhere else, or would you fix it as so much for his services and let his partner have whatever his services were worth?

A. If one of them was paid the other ought to be; if either drew a salary both ought to have been paid for services rendered.

608] Q. Then, in answering the question, if a person doing such work as Mr. Hoffman did was to receive a salary, and you were fixing that salary without any reference to what his partner or anybody else did, what would you say his services were worth?

A. Well, I say the services are hard to estimate from the fact that there ought to be no such charge. I cannot tell what such things would be worth.

Q. I say if you were going to allow any salary at all you could not allow less than \$5,000 or \$6,000?

A. Yes, sir. Hoffman would not consider anything less than that as any compensation.

Q. You are familiar with a new condition of things that would justify you in testifying as to value?

A. Well, of course, in fixing the values of such services a person would have to know all the conditions and what Hoffman did. I know that he had a full corps of assistants and did everything that could be done.

Witness excused.

Office of G. A. Brodie, Examiner, Portland, Oregon.

January 30th, 1896, ten o'clock A. M.

At this time, pursuant to adjournment, appear the parties herein as before, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

JOHN BAYS is called as a witness for the complainant on [609] rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. Where do you reside, Mr. Bays? A. Portland.

Q. What is your occupation?: A. Contractor.

Q. How long have you followed that business?

A. I have been following it in this country since 1867, and many years before that elsewhere.

Q. About what has been your total experience?

A. Well, principally railway work.

Q. What length of time, about?

A. Thirty-five years.

Q. What classes of work have you been engaged upon as a contractor during this time?

A. I have been in the street business since I have been in this country, and general railway contracts.

Q. What character of railway contracts?

A. Well, regular contracts—different things, the whole business.

Q. Construction work? A. Yes, sir.

Q. I wish you would state some of the contracts you have been engaged upon—the character and magnitude of the work.

A. Well, the company built a good part of the O. & C.

[610] Q. By that do you mean the Oregon & California Railway?

A. Yes, sir; they built 1,900 feet of the south end of Wolf Creek Tunnel, and Grave Creek Tunnel. And about a thousand feet at each end of the Siskiyou Tunnel when they stopped in 1894.

Q. What was the magnitude of these contracts—what sum of money did they involve?

A. Why, I cannot say exactly.

Q. Well, approximately?

A. We had one hundred dollars a foot for the Siskiyou Tunnel, and we got not quite a thousand feet at each end; that would be about \$400,000.00 of work done on the Siskiyou Tunnel.

Q. What was the extent of your contract work on the Wolf Creek Tunnel?

A. That would be about nineteen hundred feet, at \$69.00 a foot; I never figured it up.

Q. What was the extent of the work you did on the Oregon & California Railway?

A. Up here in Cow Creek Canyon I done three hundred and seventy odd thousand dollars of work five years ago.

Q. How recently has this work that you have referred to been done?

A. Well, I finished that five years ago in Cow Creek Canyon.

Q. That was the last work?

A. That was the last work of any magnitude.

Q. Are you familiar with what would be a proper compensation for superintending work of the character you have been acquainted with? A. I think so.

Q. Do you know the conditions which were prevailing at Portland, Oregon, in the summer of 1893, commencing with July, in regard to financial matters?

A. Yes, 1893 was pretty good.

Q. July, 1893? A. Yes, sir.

Q. Do you know at what time they had the panic?

A. Well, there was a panic commenced sometime in 1893, I think.

Q. What was the effect of that panic upon wages, salaries, values of that sort?

A. Well, they all came down, of course, after the panic.

Q. I desire to ask you this question, and take your opinion upon it: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667.00, and the contractor was required to furnish a bond in the sum of \$140,000.00 which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman, and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of capital to the prosecution of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland, was to

[612] have the active superintendence of the work, but that McMullen, who resided in San Francisco and controlled offices there, and in New York and Seattle, should render all services which should be required of him at those points. The work of manufacturing the pipe, amounting to about one hundred and eighty thousand dollars, was let on subcontract, as was also the work of hauling the pipe into position, amounting to about thirty-six thousand dollars. The work under the Hoffman contract was actually begun in June, 1893, and between March 10, 1893—the date of Hoffman's contract with the water committee—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting, plant, laborers, etc., and McMullen working on the same thing in San Francisco, Seattle and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20, 1893, Hoffman found two-thirds and McMullen one-third, the value of the latter being estimated from \$1,600.00 to \$2,300.00. Ow-
[613] ing to his inexperience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman except in the matter of furnishing money until September 20th, 1893. During this time an engineer and superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20th, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned; but Hoffman advanced from his private means at various times in the month of June, July and August, 1893, the sum of fourteen thousand five hundred dollars or thereabouts, which was

covered by his estimates paid by the water committee on September 21st, 1893, and thereafter Hoffman did not have or need not have had any money of his own in the job. Money was very tight, and salaries and wages were affected thereby as you have testified. In the partnership contract between Hoffman and McMullen, there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of time between March 6th and September 20th, 1893?

(Counsel for the defendant objects to the question, on the ground that it is not a correct statement of the facts in the case, and that there are assumptions that are false in it, and that the same is incompetent, and immaterial.)

A. Four hundred dollars a month I should say would be a big salary.

Q. You say that would be a large salary?

[614] A. Yes, sir.

Q. What do you know of your own knowledge about salaries to persons occupying similar positions in other like contracts?

(Objected to as immaterial.)

A. Well, I have done some large contracts myself in companies which I have stated, and I never got but two hundred and fifty dollars a month.

Q. Where did you get that?

(Objected to as immaterial.)

A. I got that at Cow Creek Tunnel, and at Siskiyou, and at Cow Creek Canyon—three different places.

Q. What is the character of service that you were called upon to perform in that position?

(Objected to as immaterial.)

A. General superintendent, night and day, sometimes—very often two or three nights together.

Q. General superintendent of the whole work?

A. Yes, sir.

Q. I will ask you to state if you were acquainted with Lee Hoffman during his lifetime?

A. Yes, I was acquainted with Lee Hoffman ever since I have been here—a number of years.

Q. Did you ever have any conversation with him about his relations to McMullen, and to this work?

A. Yes, sir.

Q. When did this occur?

A. About two or three days after it came out in the papers.

Q. After what came out?

[615] A. About McMullen suing him.

Q. After the suit was commenced?

A. Yes, sir.

Q. I will ask you to state what, if anything, Mr. Hoffman said about his relations to McMullen touching this work.

(Objected to as immaterial and irrelevant.)

A. He said McMullen was a partner; that he wrote to him for ten thousand dollars, and he said if he had paid ten thousand dollars, he would carry the balance, and Mr. McMullen wrote back that there was plenty of money in the job, and to borrow the money, that he did not intend to put up any of his own money.

Q. Is that all you recollect on that point?

A. Yes, sir, that is all.

Q. He said that McMullen was his partner?

A. Yes, sir.

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. When he said that McMullen was his partner, he referred to the time he had written him for the ten thousand dollars, did he not?

A. No, he said McMullen was his partner—well, I knew that; at the start when they were figuring.

Q. Did not he refer to his having written McMullen a letter for ten thousand dollars, and that at the time he wrote the letter McMullen was his partner, is not that what he said?

[616] A. He said he wrote to Mac to put up, and if he had put up ten thousand dollars he would carry the balance; that McMullen wrote back to him that there was money enough in the job, and for him to borrow the money.

Q. He referred, then, to the time he wrote the letter?

A. That was the time.

Q. That was what he claimed?

A. Yes.

Q. Now, you say you were superintendent of the work of constructing the tunnels you have mentioned? A. Yes.

Q. You were in the employ of the corporation of Bays & Jeffries?

A. No, sir, I was one of the corporation—a partner.

Q. You were in the employ of the corporation, were not you?

A. Of, course, I was in the employ of myself and the corporation.

Q. The corporation hired you to superintend the work at two hundred and fifty dollars a month? A. Yes.

Q. The business of providing funds to carry that on was furnished by the corporation, Bays & Jeffreys?

A. No, sir, it was paid for, the same as the water committee, monthly.

Q. Did you and Jeffreys, the corporation of Bays & Jeffreys have anything to do with providing funds to carry on the business? A. Certainly.

Q. That was provided by the corporation of Bays & Jeffreys? A. Yes.

Q. And you went in there in the employ of Bays & Jeffreys simply as their superintendent?

A. Yes, but I had to put up the same as the balance of them.

[617] Q. You did? A. Yes, I did.

Q. Now, Mr. Bays suppose there was a contract to manufacture and lay pipe for conducting water from Bull Run to Mt. Tabor in which Hoffman and McMullen was concerned as partners, each agreeing to pay one-half of the expenses—to put up one-half of the money necessary to carry on the business. Mr. McMullen had a lot of plant over at Seattle that he turned in—he has a lot of contractors' tools, and a lot of plant there that he was not using, of the value, say, of from twelve to fifteen hundred dollars. He buys, at the instance of Mr. Hoffman, in New York, a hydraulic punch and shears at the expense of some three hundred dollars, and pays for it. At the request of Mr. Hoffman, he orders in San Francisco a

dozen or more portable forges, which are paid for out of the funds of the company, and not by Mr. McMullen. Mr. McMullen does such things as Mr. Hoffman asks him to do in the way of finding the price of tools and advised with Mr. Hoffman when he is asked by Mr. Hoffman to do so about the propriety for instance of getting a machine to do their ditching with, and does such things as Mr. Hoffman asks him to do, but he does not put up any other money, but Mr. Hoffman has the whole care and management of the job on his hands—not simply the superintending of the business, but has the whole thing on his mind; he is obliged to provide money to carry it on, if the estimates are not promptly paid by the city, and, as a matter of fact, he is obliged to put up, and does put up, about fourteen thousand dollars of his own money. He is obliged to make arrangements, and does make arrangements, after being notified by the city water committee that there is [618] no certainty that he will have any money to pay his men and bills which would come due in September, and he is obliged to make arrangements to meet those bills when they come due, and has the whole care of letting contracts for the manufacture of the pipe, and the whole care and responsibility of letting contracts for the purpose of hauling and delivering the pipe, and takes and carries on the whole business, while Mr. McMullen has to do such things as he is asked to do by Mr. Hoffman, but is not responsible for the work. Mr. Hoffman had to put up a bond for a hundred and forty thousand dollars on which Mr. McMullen is in no way responsible—does not sign it himself, and does not have anything to do with procuring the sureties to sign it. Under those circumstances, Mr. Hoffman carries on his business, and manages it—not simply superintending, but manages and has the whole control of the business. Now, under those circumstances, what do you say would be the value of Mr. Hoffman's services per month.

(Counsel for complainant objects to the question on the ground that it presents an incorrect and incomplete statement of facts.)

A. Four hundred dollars a month.

Redirect-Examination.

Questions by Mr. COX:

Q. What interest did you have as a stockholder in the Bays & Jeffreys Company that was doing these contracts that you spoke of?

[19] A. I had a half interest in the last one, and I had a quarter interest in the other two tunnels.

Q. What interest did you have at the time you were drawing \$250 a month?

A. I had a half interest in one and a quarter interest in the others.

Witness excused.

D. P. THOMPSON is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation, Mr. Thompson?

A. I have been a contractor, and banker.

Q. For what length of time have you been a contractor and what class of contracts have you been engaged in?

A. I have been a contractor about forty years, in early days surveying contracts, building jetties on the river, constructing railroads, and constructing tunnels for railroads, erecting waterworks, and contracts for supplying stone for the jetty at the mouth of the Columbia river were the principal contracts.

Q. What was the magnitude of some of these contracts?

[20] A. Well, the railroad contract amounted to a number of million dollars; I cannot give the amount—seven million, perhaps. The contract for the erection of the jetty at the mouth of the Columbia river—the stone there amounted to two or three hundred thousand—two hundred and fifty thousand, perhaps. I cannot give the amount.

Q. What did the tunnel work come to?

A. The tunnel work in which I was interested was on Cow Creek—the Bunker Hill Tunnel and the Siskiyou Tunnel. I cannot give the amount of those contracts, but they amounted

to two or three hundred thousand dollars—five hundred thousand, perhaps.

Q. Was John Bays concerned with you in those contracts?

A. He was.

Q. Are you familiar, Mr. Thompson, during the time that you have been a contractor, with what would be the reasonable value of the services of a general manager or superintendent for such like contracts.

(Objected to as immaterial and irrelevant.)

A. I am familiar with what it would be.

Q. You know what general market value should be applied to such services?

A. Well, I only know what was allowed on the contracts in which I was interested; I know nothing beyond that.

Q. I am speaking of what has been allowed generally; if you were going to employ a general manager for work of that character, would you know what compensation ought to be allowed for salary?

(Objected to by defendant as incompetent.)

[621] A. I think I would; yes, sir.

Q. Were you acquainted with the financial condition of affairs in the summer of 1893, commencing in July in the city of Portland and elsewhere?

A. It was after July.

Q. How soon after?

A. Well, commencing the last part of July. I was not in the country the fore part of that year, and I was not familiar with what was done until the latter part of 1893.

Q. Well, commencing in the month of July, when you returned, I will ask you to state what the condition of finances was generally, and what effect it had on the matter of wages and salaries and compensation for services performed and things of that sort.

(Same objection.)

A. Well, money was very hard to get, and the banks were suspending, very many of them, and it was almost impossible to get money at that time, and the effect, as a matter of course, was a reduction of wages and values of that kind throughout the country.

Q. Did you hear the question I read to John Bays who was within the last hour a witness on the stand, stating the facts

touching the contract between Hoffman & McMullen and the services performed by them in connection with the work embraced within that contract?

A. I did.

Q. Applying that question to yourself I will ask you to state, what in your judgment was a fair and reasonable compensation to allow Hoffman for the services performed by him during the time covered by the question.

(Counsel for defendant object to the question for the same reasons stated when the question was asked of Mr. Bays.)

A. I think that \$5,000.00 a year would be full compensation to Mr. Hoffman if Mr. McMullen done nothing. I might add that Mr. Hoffman would be entitled to interest for any money advanced in addition to that.

(Counsel for defendant moves to strike out the answer of the witness as not responsive to the question.)

Q. Then if McMullen was rendering services, would the compensation allowed to Hoffman be influenced by what McMullen was doing? A. Yes, it would.

Q. I will ask you to state, Mr. Thompson, if you know of your own knowledge anything about salaries which were paid to persons occupying towards other similar contracts the position which Hoffman occupied towards the contract under consideration here?

(Objected to by defendant as incompetent and immaterial.)

A. About that time I only knew of one contract being prosecuted and in that Mr. Hoffman was a partner with myself.

Q. What contract was that?

A. That was in furnishing the stone for the jetty at the mouth of the Columbia.

Q. What did you say was the amount of that contract?

A. I think the total contract was about \$350,000.

Q. Did you have any person occupying towards that the position that Mr. Hoffman occupied toward this contract?

A. Mr. Perry Hinkle had charge entirely of the work, and [623] he received \$150.00 a month, I believe, for his services as superintendent.

(Same objection.)

Q. You may state whether that allowance was made by

agreement of the parties in interest—the contractors.

A. It was.

Cross-Examination.

Questions by Mr. MALLORY:

Q. Now, Mr. Thompson, Mr. Hinkle was a mere superintendent of the works, was he not? A. Yes.

Q. You and Mr. Hoffman and Mr. Hinkle together were the managers of it and had control of the matter, did not you?

A. We had control of the matter, of course, if we chose to occupy it, but we did not do it.

Q. So you simply hired him to superintend the work?

A. Yes.

Q. Now, then, did Mr. Hinkle have anything to do with the responsibility of furnishing and providing means to pay the men?

A. No, Mr. Hinkle only provided his portion.

Q. He paid his portion, and you paid your portion and Hoffman paid his? A. Yes.

Q. There was no question of finances at all?

A. No, the question of finances was not concerned in the matter.

Q. Did you hear the question I put to Mr. Bays?

A. I heard the question; perhaps I did not understand it.

[624] Q. I will ask the question of you: Mr. Hoffman has a contract with the city water committee to manufacture and lay pipes for conveying Bull Run water from Bull Run to Mount Tabor; the contract price of the work is \$465,000 and some odd dollars, and other work is done that increases the amount to something over a half a million dollars. Payments for this work were to be made by the city upon estimates made by their engineer on the 20th of each month as the work progressed. Mr. Hoffman was to have charge of the work under an agreement of copartnership between himself and Mr. McMullen, and each was to furnish one-half the money necessary to carry on the business, and they were to share equally in the profits or stand the losses. A bond for \$140,000 was required to be given by the water committee. This bond was given by Hoffman, McMullen neither signing the bond or furnishing any surety whatever, and so far as the bond was concerned had

no liability whatever under the contract with the city. Mr. McMullen had a quantity of plant such as is used in work on railroad, grading and the like of that—camp equipage, plows, scrapers, and some horses, which he turned over to Mr. Hoffman, the value of which was somewhere from twelve to fifteen hundred dollars. Mr. McMullen lived in San Francisco, his business was there and he was not expected to and did not give the work any direct attention. At the request of Mr. Hoffman, he purchased in New York a hydraulic punch and shears, the cost of which was about \$300.00, which was paid for by the San Francisco Bridge Co. under direction of McMullen.

- 625] Mr. McMullen ordered, at the request of Mr. Hoffman, some dozen or more portable forges for heating bolts to lay the pipe; these were paid for out of the general fund, not by McMullen or the San Francisco Bridge Co. Mr. McMullen furnished no money whatever other than that indicated for carrying on the business. Mr. Hoffman was obliged to furnish all the money, and did in fact from his own funds furnish about \$14,500.00. That about the fore part of September, 1893, when the expenses and payroll for the month would amount to something more than \$20,000.00, he was notified by the water committee that there was no certainty that any money would be obtained or that any bonds would be sold in that month, and that they had no assurance that they could furnish him with money to pay his bills at that time, in consequence of which Mr. Hoffman was obliged to and did make preparations to meet his bills—took the responsibility of doing that and was obliged to do so. He then applied to Mr. McMullen to furnish his proportion of the funds, which Mr. McMullen absolutely refused to do, but on the contrary, recommended to Mr. Hoffman that instead of paying his bills for supplies that he “stand them off” and not pay them. From the time the contract was let in March to the time that the work of laying the pipe began in June, Mr. Hoffman had to make and did make contracts with parties for manufacturing the pipe, having that responsibility entirely on his own hands, and he also let a contract for hauling the pipe out from the place of manufacture to the place of use. He had the entire responsibility of this whole work on his hands. In the meantime such mat-
- 626] ters as ordinarily pertain to a man's affairs he attended to. McMullen did such things as he was asked to do for Mr. Hoffman, and was consulted about the matter of providing tools

for carrying on the work, and the method of conducting the work, by letter and otherwise. Now, having such responsibility and having charge of the work in that form, what would you say his services were reasonably worth?

(Counsel for complainant objects to the question, on the ground that it is based on an incorrect and incomplete statement of facts.)

A. I think that \$400.00 per month or \$5,000.00 per annum, which is substantially the same thing, would be about what his services were worth, and my experience and observation is that where one party furnishes more money than the other they are allowed interest on the money, which has been often done in contracts in which I have been interested.

Q. Now, Mr. Thompson, you do not consider that it was worth anything to Mr. McMullen at all more than simply an ordinary superintendent that he was relieved entirely from all responsibility, that Mr. Hoffman had to carry this whole responsibility on his own shoulders—you do not give Mr. Hoffman any more credit or consider that he was entitled to any more compensation than if he was sure the money was coming and the bills would be coming every day—you put your opinion on that ground—you think he was a mere hired man executing the business that was put into his hands, do not you?

A. No, sir, I do not.

[627]

Redirect Examination.

Questions by Mr. L. B. COX:

Q. What do you think a hired man to perform that service could be had for at that time, Mr. Thompson?

(Defendant's counsel objects to the question, on the ground that the witness does not seem to know, and as incompetent and immaterial.)

A. As good men as I know of, or men that I would as readily have trusted as Mr. Hoffman—and Mr. Hoffman was a trusty man, because I know that from experience—could have been had for \$200.00 a month. But I have estimated the responsibility that attached to Mr. Hoffman as having sole charge of the work without Mr. McMullen having anything to do, as \$400 a month.

Q. You mean that as a charge against the firm or as a charge against McMullen?

A. A charge against the firm—\$400.00 making the charge against the firm.

Q. Now, Mr. Thompson, in the Hinkle matter, was there any different circumstances attending the services that Mr. Hinkle performed to those that Mr. Hoffman performed except in the matter of providing money?

(Question objected to as incompetent and immaterial.)

A. I think that was all except the bond.

(Question also objected to on the ground that it does not appear that the witness knew what Hoffman's duties were and the question is incompetent.)

Q. You may state the scope of Hinkle's duties.

(Objected as immaterial.)

[628] A. He had charge of the whole work; he made what contracts he chose, he bought whatever machinery there was to purchase, and I think the machinery that he purchased amounted to about \$23,000.00, and he had the supervision of the whole work.

Recross-Examination.

Questions by Mr. MALLORY:

Q. You think Hoffman could put his whole time in this work, apply himself to it right along, and McMullen could go about his business and have this work carried on at an expense to him of \$200.00 per month, Mr. Hoffman getting the same amount, that is what you mean?

A. Yes, that is what he should get from the firm—\$400.00.

Q. And he would be entitled to one-half of any profits that resulted to him?

A. I think so.

Q. So, really, Mr. McMullen in allowing \$400.00 per month is only paying \$200.00 to have this whole business carried on?

A. Yes.

Witness excused.

F. T. DODGE is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

[629]

Questions by Mr. L. B. COX:

Q. Mr. Dodge, look at the papers I show you and state if you have compared them with the final estimate which was offered in evidence the other day—the estimate from the water committee to Hoffman.

A. Yes, sir, I compared those papers and they are identically the same—that is, they are a true copy.

Q. What is the paper I show you?

A. This paper is a copy of the original contract between Lee Hoffman, doing business as Hoffman & Bates, and the city of Portland.

(It is agreed that the paper last produced by the witness may be received and filed in lieu of "Complainant's Exhibit No. 2," already offered.)

Q. I now show you what purports to be a copy of minutes of the water committee held on the first day of March and the second day of March, 1893, and ask you to state if those are true copies taken from your minute-book.

A. They are.

(Counsel for complainant offers in evidence the paper last produced by the witness. Objected to by defendant as immaterial and irrelevant. The papers referred to are received and filed marked "Complainant's Exhibit No. 26," G. A. B. Ex.)

Q. On the first page of the second paper offered I see a reference made to an entry, "That the following printed matter is a copy thereof"—explain what that means, "the following printed matter."

630] A. It has been customary at the meetings of the water committee for reporters of the newspapers to be present, and as this was a work of interest to the public, important and interesting papers were given to the newspapers to be published, and it was the custom of the water committee to have the printed copy pasted in the records and made a part thereof. In this particular instance, to the best of my recollection, the engineer's letter or statement submitting the bids he kept no copy of, but laid it before the committee with all the bids, and the committee then allowed one of the newspapers to take this statement of bids for the purpose of publication, but the printed matter was an exact copy of his statement.

Q. The meaning of this is that the original minute in your book as to this matter was an exemplified or printed copy of the original letter? A. Yes.

No cross-examination.

Witness excused.

J. B. MONTGOMERY is called as a witness for the complainant on rebuttal and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation, Mr. Montgomery?

[631] A. Well, I am just attending to my own private business. I have no particular occupation ~~just~~ now.

Q. What have you had to do with contract work?

A. I have been a railroad builder and millowner, and have been engaged in the work of taking out rock, and have done all sorts of contract work.

Q. What length of time did you follow such business?

A. Well, from 1858 until 1883 or 1884; there were periods when I was not occupied you know.

Q. I wish you would enumerate some of the contracts upon which you have worked.

(Counsel for defendant objects to the question, for the reason that the witness does not show that he has done any work of that character for ten years prior to the time concerning which he is called upon to testify, and his evidence is incompetent and immaterial.)

A. Well, I had a contract from the Pennsylvania & Hope-well Railroad—the Linden bridge across the Susquehanna, a large bridge probably 1300 feet long. I was interested in the Oil Creek & Alleghany Railroad and about 45 miles of the Kansas Pacific.

Q. What work have you done in this country?

A. Well, I have built pretty much all the railroad between here and Tacoma except 30 miles; I built about 145 miles, I guess, and I have built some 60 or 70 miles of the Willamette Valley Railroad.

(It is agreed between the parties that all this evidence goes in subject to the objection heretofore made by the defendant.)

[632] Q. What experience have you had in the matter of stone work—you said you had some contracts of that character?

(Counsel for defendant object to the question as immaterial and irrelevant.)

A. I have had a good deal of experience in that kind of work.

Q. What have been some of your contracts in that direction?

A. Well, on the Linden Bridge were 7 piers and 2 abutments upon the Susquehanna, in 18 feet of water.

Q. Now, have you been familiar, Mr. Montgomery, with the conditions prevailing in this country down to the year 1893 about the employment of men and the performance of work, and things of that sort? A. Yes, sir.

Q. Do you know what the conditions, generally, were in 1893 and 1894?

A. Yes, they are about as they were in 1883. They were not changed at all—that is, as to labor it was about the same. It was a little less in 1893 probably—yes, in 1893 wages for labor were less.

Q. What was the financial condition, if you know, commencing in July, 1893, and continuing through the remainder of that year and 1894?

A. The financial condition of the country?

Q. Yes.

A. It was in a very bad condition.

Q. Did that prevail here? A. Yes, sir.

Q. What effect did that have, if any, upon the salaries and wages paid to persons engaged in business?

A. Why, it had the effect of reducing them.

[633] Q. I desire to ask you this question and take your opinion upon it; Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667.00, and the contractor was required to furnish a bond in the sum of \$140,000.00, which bond was secured by Hoffman, the securities being two in number, one a

former partner of Hoffman's and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen, each of them was to contribute an equal amount of capital to the prosecution of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland, should be the active superintendent of the work, but that McMullen, who resided in San Francisco, and controlled offices there and in New York and in Seattle should render all services which should be required of him at those points. The work of manufacturing the pipe was sublet at a price of about \$180,000.00, and the work of hauling the pipe into position was also sublet at a price of about \$36,000.00. The work was actually begun in June, 1893, and between March 10, 1893—the date of Hoffman's contract with the water committee—and the commencement of the work both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle, and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20th, 1893, Hoffman found 2-3 and McMullen 1-3, the value of the latter being estimated from \$1,600.00 to \$2,300.00. Owing to his inexperience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman except in the matter of furnishing money until September 20th, 1893. During this time an engineer and a superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20th, 1893,

[635] McMullen advanced no money to the firm except that represented by his contribution to the plant above-mentioned but Hoffman advanced from his private means at various times in the months of June, July, and August, 1893, the sum of \$14,500.00 or thereabouts, which was covered by his estimate paid by the water committee on September 21, 1893, and thereafter Hoffman did not have, or need not have had, any money of his own in the job. Money was very tight, and salaries and wages were affected thereby, as you have testified. In the partnership contract between Hoffman and McMullen, there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be a proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of time between March 6, and September 20, 1893?

(Counsel for defendant object to the question, for the reason that it is not a correct assumption of the facts shown by the evidence, and that the question is incompetent, irrelevant, and immaterial.)

A. I would consider that an ample salary from the 1st of March to the 1st of September, 6 months, would be \$250.00 a month, and I can give you my reasons if you desire.

Q. Go on and state your reasons if you desire.

A. My reason is that I had Mr. Hoffman employed when I had charge of 60 or 70 miles of road in the Willamette Valley; I had him employed in building 4 or 5 bridges, and probably \$20,000 or \$30,000 worth of trestle work, and during that time I paid him \$135 a month.

Q. You were acquainted with Mr. Hoffman, were you?

A. O, yes, and I also had him build my warehouses and I paid him, I think, \$4.00 a day—probably \$5.00—but wages were higher then than they are now.

(Counsel for defendant moves to strike out that portion of the answer of the witness in regard to his own personal affairs with Mr. Hoffman.)

[636] Q. I will ask you to state whether you have known of your own knowledge any person occupying towards a job similar to the contract under consideration the position which Hoffman occupied towards it—that is to say, having an interest in the

contract and at the same time acting as general manager or superintendent, and, if so, what salary was allowed in the instances that have fallen under your observation.

(Question objected to by counsel as incompetent and immaterial.)

A. Where a party has an interest in it?

Q. Yes, where he has an interest and is also acting as general manager or superintendent.

A. Well, I do not know of such a case. I know a case where they had a third interest, but they were not allowed any salary at all.

Q. Do you call to mind any instance in which a salary was allowed to a party having an interest?

(Question objected to by counsel for defendant as incompetent and immaterial.)

A. No. I do not. I can only speak of my personal experience. In Pennsylvania I had a number of contracts, where I had partners in the work and I did not allow them any salary at all. I would come down and consult with them, but I did not allow them any salary. They took the risk along with the others.

Q. I will ask you another question—now, what was the magnitude of some of the contracts upon which you were engaged?

A. O, some of them amounted to millions of dollars, and some of them were from \$35,000 to \$80,000.

Cross-Examination.

27]

Questions by Mr. R. MALLORY:

Q. You have not done anything in contracting, or hiring or discharging men since 1883?

A. Not since 1884.

Q. You have not done any business in that line since then?

A. No, I have not had any railroad business; I have had mills.

Q. You have not had much to do in the matter of fixing wages or dealing in wages? A. Not since that time.

Q. Now, Mr. Montgomery, you say that the pressure of times in financial matters about the close of 1893 would materially reduce wages; do you mean to say that they would

materially affect the wages of men who were engaged in executing contracts where they were superintending and managing the whole business, and carrying it on and having the whole responsibility of it—would the fact that wages were reduced affect the value of their services?

A. Well, I should suppose that all wages ought to come down.

Q. I am asking you for the facts.

A. I have not had any experience recently, although I know that wages have been very much reduced under such conditions as I have stated, where men who were managing and controlling and handling great enterprises, that the [638] prices paid for the services of men of that kind were reduced—

Q. Do you know that to be so?

A. Certainly; if I had had men employed I certainly would have reduced their wages.

Q. I am not asking you that question.

A. I do not know anything about it. I have not been in the business.

Q. Now, then, Mr. Montgomery, Mr. Hoffman was awarded a contract by the city water committee for manufacturing and laying of steel pipe required to convey water from Bull Run to Mt. Tabor. The amount of the contract was \$465,667, and Hoffman and McMullen operated together to get the contract, and afterwards reduced their contract to writing and made themselves partners, and agreed that each should furnish one-half the money necessary to carry on the work, and should share equally in the profits and losses. Hoffman to take charge of the contract in Oregon and of the general supervision and management of it. A bond was required of Mr. Hoffman by the water committee for \$140,000, to secure the performance of the contract. Immediately after the contract was awarded Mr. Hoffman made a contract with Wolff & Zwicker to manufacture the steel into pipes from the plates, the amount of which was \$180,000, or about that, and he also made a contract with another party to haul the pipe when manufactured to the place where it was to be used. Mr. McMullen, or the San Francisco Bridge Company, of which Mr. McMullen was the principal stockholder, had a quantity of plant such as is in use by railroad contractors, consisting of

- 39] camping outfit, scrapers, plows, carts and a few horses valued anywhere from \$1,200 to \$1,500. That was turned over to Mr. Hoffman to help carry on the work and Mr. McMullen, at the instance and request of Mr. Hoffman, purchased in New York a hydraulic punch and shears at an expense of about \$300. Mr. McMullen, also, at the request of Mr. Hoffman purchased a dozen or more portable forges for heating rivets out on the line, and he did such other chores as Mr. Hoffman asked him to do from time to time, and consulted some with Mr. Hoffman about the kind of tools they had better provide and did such things as that, but his own time was left entirely at liberty and he was under no obligation to give any attention to this matter at all. Mr. Hoffman commenced the work of laying this pipe about the first of June, and from the first of June until the 30th of September he had put in about \$14,500 of his own money. Payments were to be made for the work provided for in this contract upon estimates made by the engineer of the water committee on the 20th day of each month. In the early part of September, on account of the condition of finances, the water committee were not aware certainly that they could make sale of any bonds for that month to meet the bills due in that month. Under the arrangement they had for selling the bonds the party had an option to buy, but he had to notify the committee on the 5th day of each month how many bonds they would take that month, but on the 4th day of September the committee was informed by the party that had this option for the sale of bonds that they could not take the bonds necessary to meet their bills on that month unless the option to take
- 40] them could be extended to the first of October. This left the committee without any certainty of having the money to met the bills that were due on the 20th of the month. A meeting of the committee was called and Mr. Hoffman was called before them, and was notified that there was no certainty that there would be any money to pay the bills, amounting to some twenty odd thousand dollars, on the 20th. In the meantime Mr. McMullen had put nothing into the contract at all except the plant and the money that he paid for the punch and shears. Mr. Hoffman called upon him to put up his share of the money. Mr. McMullen declined to put it up, and responded to Mr.

Hoffman's call by telling him that he ought to stand off the men; that he had not agreed to pay until he could pay them—to stand them off until they got money, and sent no money to Mr. Hoffman whatever—declined to furnish him with any, and in order to have the work go on Mr. Hoffman was compelled to make arrangements with other parties to furnish the money, and did make such arrangements. He carried the whole responsibility of that contract on his shoulders; he executed the bond. Mr. McMullen was not on the bond at all and was not liable in any way. Mr. Hoffman took the whole business and managed it himself—took all the responsibility and attended to the affairs of the company as they were required, and everything that was done about it developed upon him in so far as the work of managing the business was concerned. Now, I will ask you to state what, under such circumstances, you think would be a fair compensation for his services.

A. How long did he have to have that money in—how many months?

[641] Q. The money that he advanced was in from the early part of June until the 20th of September, but at the time that he advanced this money he had no certainty when he would get it back.

A. He got it back in September?

Q. Yes.

(Counsel for complainant object to the question as presenting an incorrect and incomplete statement of facts as shown by the evidence.)

A. Well, I can answer that best by telling my own experience.

Q. Just answer my question.

A. Well, I do not think it would alter my opinion of \$250 a month; I can give you my own experience.

Q. I do not ask you for your own experience.

A. Well, I can only judge from my own experience.

Q. I understood you to say that Mr. McMullen could go in with Mr. Hoffman on a contract like that, and relieve himself of the entire responsibility of the contract, and have nothing whatever to do with it, and could hire Mr. Hoffman for \$125 a month.

A. Did not I say \$250 a month?

Q. One-half of the amount—one-half of \$250 was Mr. Hoffman's, and Mr. McMullen's part of that would be \$125.

(Counsel for defendant object to the question as based upon a misstatement of facts.)

A. Judging from what my own experience was I would say that for a man to put up all the money and to furnish all the bonds and security, that \$250 was ample compensation.

2] Q. Mr. Montgomery, you had not heard of this case until you were on the stand? A. I have heard of it.

Q. You have not talked on this subject? A. No.

Q. Neither with Mr. McMullen or Mr. Cox?

A. No, but I have been cognizant of the case.

Q. But have not talked with Mr. McMullen? A. No.

Q. He did not know what your testimony would be?

A. No.

Q. You never told him what you thought would be the value of a man's services?

A. I have talked with him very little. He told me the suit was going on.

Q. That is all the conversation you had?

A. Yes, sir.

Redirect Examination.

Questions by Mr. L. B. COX:

Q. Mr. McMullen stated to you a day or two ago that he wanted you to give testimony? A. Yes, sir.

Q. You did not tell him what your testimony would be?

A. No, I did not tell him that because I did not know.

Q. Now, Mr. Montgomery, this figure that you express—\$250 per month—was that intended to be a charge against the job, or against the firm?

643] A. I should think it ought to go against Mr. McMullen. I did not think about that, but I think it ought to go against McMullen.

Q. Then your judgment would be \$500 against the firm?

A. Yes, \$500 against the firm, \$250 against McMullen; he ought to pay that out of his share of the profits whatever it was.

Q. Then Hoffman should draw his money out of the firm assets before there was any division between him and McMullen? A. Yes.

Q. Now, what would he draw out of the firm assets?

A. He ought to draw \$500—that is, \$250 for himself and \$250 for McMullen.

Witness excused.

I. W. SMITH is recalled as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. Have you any means of determining during what time in the winter of 1893 and 1894 the work which was being done by Hoffman in the laying of the steel pipe on the Bull Run line was shut down to such an extent that it was practically suspended?

[644] A. Well, the only way I know is by the amount of work done and the different estimates. The work started in in 1893 and continued during the whole winter.

Q. What was the work done in January, February and March, according to your estimates?

A. My estimate for December, 1893, was \$14,040.79; for January, 1894, \$1,865 and for February, 1894, \$3,803. I have no estimate for March, because the work was not completed—no portion of the work was completed.

Q. How was it in April?

A. March and April two estimates, \$48,078.89. There was work done in March but none of it was completed, and I refused to give an estimate, but the estimate for April is for two months.

Q. What was your estimate for November, 1893?

A. To September 30th, \$31,539.81, and for November \$6,343.39. I will say with regard to these estimates that 10 per cent was deducted from the actual amount, so that these amounts are actual amounts less 10 per cent.

Q. Can you tell, Colonel, what money was paid to Hoffman in September, 1893? A. \$31,539.81.

Q. How much was the estimate for October?

A. The October estimate was \$66,803.85.

No cross-examination.

Witness excused.

S. W. ALDRICH is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

645]

Direct Examination.

Questions by Mr. L. B. COX:

Q. Where do you live? A. Portland, Oregon.

Q. What is your occupation? A. Contractor.

Q. How long have you followed that pursuit?

A. About ten years.

Q. What character of a contract have you been concerned in?

A. In construction work of most all kinds, from water-works to building tunnels on railroads.

Q. I wish you would enumerate some of the contracts that you have been connected with?

A. Well, there was the Portland Water Works, building of the reservoir up here in the City Park, and the extension from here to the sound line of railroad when that was stopped.

Q. You mean the railroad extension?

A. Yes, sir, and also a railroad building in Idaho and California.

Q. What amount of money was involved in these contracts as you have enumerated, Mr. Aldrich, or some of them?

A. Well, I think my contract up here—building the reservoir—the original contract was not so much, but before I got through it came to some seventy or eighty thousand dollars.

Q. What did the railroad contracts which you had amount to?

A. That would be a hard matter for me to tell.

646] Q. Approximately.

A. Well, on the sound line I had just got started when they shut down; I done about seventy thousand dollars' worth of

work; the original contract came to about four hundred thousand dollars.

Q. Were you in Portland in the summer of 1893?

A. I was.

Q. What was the financial situation here and throughout the country during that summer commencing along in July?

A. Well, I always found it tough enough, and I don't consider it is any too good now.

Q. Was there any marked difference between the condition of finances here generally and throughout the country commencing with July, 1893, from what it was before that time?

A. I do not know as I would be prepared to answer that intelligently; it is something that I never paid much attention to; it used to keep me rustling to meet my bills, but I always done it, and that was about all the attention I paid to the matter.

Q. What was the situation in regard to the banking business and things of that sort?

A. Well, they were in terrible bad shape; I know that myself; it closed up some of them here.

Q. Now, what effect had this condition of things upon wages, salaries and the compensation paid for services, if you know?

[647] (Counsel for defendant objects to the question, on the ground that the witness has not shown himself competent to answer.)

A. Well, I have paid less for them during the last two years than I ever did previous.

(Counsel for defendant moves to strike out the answer of the witness as not responsive to the question.)

Q. Do you know, from your own observation, what the general effect was in regard to salaries and wages and general compensation paid people during the time that I called your attention to, 1893 and following, 1894.

(Counsel for defendant objects to the question, on the ground that the witness has not shown himself competent to answer, and because the question is immaterial.)

A. Well, I think the general depression of business and finances of the country caused everything to go down and wages were less then than they have ever been since I have

been in the country. I have myself hired men for less money than I ever did before.

(Counsel for defendant moves to strike out the answer of the witness as not responsive to the question and as immaterial.)

Q. I will submit this question to you and ask your opinion upon it: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667.00, and the contractor was required to furnish a bond in the sum of \$140,000.00. which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman's and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen, each of them was to contribute an equal amount of capital to the prosecution of the enterprise. and they were to share equally in its profits and losses; it was also agreed that Hoffman, being a resident of the city of Portland, should have the active superintendence of the work, but that McMullen, who resided in San Francisco and controlled offices there and in New York and in Seattle, should render all services which should be required of him at those points. The work of manufacturing the pipe was sublet at a price of about \$180,000.00, the work of hauling the pipe into position was also sublet at a price of about \$36,000.00. The work was actually begun in June, 1893, and between March 10th, 1893—the date of Hoffman's contract with the water committee—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and selecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle and New York. Upon the commencement of active operations in June Hoffman assumed the superintendence of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated, until September 20th 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention

[649] to this work, was also engaged in other contract operations. Of the plant consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20th, 1893, Hoffman found two-thirds and McMullen one-third, the value of the latter being estimated from sixteen hundred to twenty-three hundred dollars. Owing to his inexperience in said work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman, except in the matter of furnishing money until September 20th, 1893. During this time an engineer and a superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at expense of firm. Between June and Sept. 20th, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned, but Hoffman advanced from his private means at various times, in the months of June, July, and August, 1893, the sum of fourteen thousand five hundred dollars or thereabouts, which was covered by his estimates paid by the water committee on September 21st, 1893, and thereafter Hoffman did not have, or need not have had, any money of his own in the job. Money was tight and salaries and wages were affected thereby as you have testified. In the partnership contract between Hoffman and McMullen there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be a proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of the time between March 6th and September 20th, 1893?

[650] (Counsel for defendant objects to the question, on the same ground as stated when the same question was propounded to other witnesses.)

A. Is that for a month or for the whole time?

Q. For this period of time between March 6th and September 20th, 1893?

A. I consider \$2,500 a big salary.

Q. \$2,500 for seven months? A. Yes, sir.

Q. What would you say per month?

A. About \$325.00, or a little more—\$350.

Q. What would you say, Mr. Aldrich, as to the compensation to be allowed during the months of March, April and May, when the parties were getting ready for the work, in comparison to the compensation to be allowed during June, July, August and part of September, when the work was actually being carried on?

A. Well, that would depend a good deal on the amount of time that would be required; a man is paid for time whether he is getting ready or actually prosecuting the work.

Q. In fixing this charge do you mean an allowance against the firm of Hoffman and McMullen or a charge against McMullen only? A. Against the firm.

Q. I will ask you to state, Mr. Aldrich, if you know of any man situated towards any similar job as Hoffman was situated towards this job, who drew a salary, and if so, what was the amount paid him.

(Counsel for defendant objects to the question as incompetent and immaterial, and that the witness is not qualified to answer.)

A. Well, I have, but it was not strictly laying pipe; it was handling men.

Q. What I mean is, in a work of this magnitude, requiring a general superintendent, such as Mr. Hoffman was required to perform as general manager of this work.

A. Well, I have charge myself of ten times as many men as he had and I do not say that in any disparagement of him.

Q. Where was that?

A. That was on the line from here to the Cascades under Thielsen and J. L. Hallett. Hallett had charge of all the men on that line and he was paid a salary of \$500.00 a month and I was foreman under Hallett.

(Counsel for defendant moves to strike out the answer of the witness as incompetent and not responsive to the question.)

Q. Do you know of any man who was both a contractor and also a superintendent, as Hoffman was in this case, who had an interest in the outcome of the contract in addition to the allowance which might be made him for his time as superintendent—a man occupying the position of Hoffman towards this contract or towards any contract?

A. Well, I had a contract myself five miles on the Kalama branch with my partner. We had about \$350,000 or \$400,000 contract. I drew a salary of \$150.00 a month for staying on the job and looking after the work.

[652] Q. What were your services in that connection—what were the scope of your duties?

A. General superintendent of everything—had charge of everything.

Q. What was the amount of your contract?

A. I stated that before; we did about \$70,000.00 worth of work and they shut down.

Q. What was the total amount of the contract?

(Same objection.)

A. Somewhere near \$400,000—the whole thing.

Q. Now, was it on the basis of the character of your work that you were allowed the salary that you drew?

A. Yes, that was the understanding when we started in.

(Counsel for defendant moves to strike out the answer of the witness as incompetent.)

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. When Mr. Hallett was general manager and superintendent of building the O. R. & N. Co. line, what he had to do was general manager of the men and to see that the work was carried on?

A. He was superintendent of the whole thing.

Q. He had nothing whatever to do with furnishing money or providing means for carrying on the work?

A. No.

[653] Q. Would you consider that it would affect the value of a man's services if he were a partner in a contract where it had been agreed between him and his partner that they should put up equally the amount of money necessary to carry on the work, and the partner in charge had to provide the means himself, his partner refusing to put up any money at all, and he had to provide it all from his own funds, and manage the work and conduct it all—would you consider that a man under such circumstances would be entitled to any more salary as

against his partner than he would if he was simply on the ground to direct the men as Mr. Hallett was or as you were?

A. Well, I have been placed in that very same position myself.

Q. Just answer my question.

A. No, I do not.

Q. Do not make any difference?

A. No.

Q. I will ask you this question: Suppose that Mr. Hoffman had taken charge of a contract with the city to manufacture and lay pipe for conducting Bull Run water from Bull Run to Mount Tabor, the amount of the contract being \$465,000.00 and some odd dollars; an agreement was entered into between himself and Mr. McMullen, in which they propose to do the work together, each putting up his share of the money necessary to carry on the work, Mr. Hoffman to attend to and manage the affair, but Mr. McMullen don't put up any part of the money at all when called on, but did contribute part of the plant and bought a pair of hydraulic shears and a hydraulic punch, and did such chores as Mr. Hoffman asked him to do in San Francisco and New York, and performed services in the way of advising Mr. Hoffman, when asked for advice, as he was able to, but Mr. Hoffman put in all the time necessary to the conduct of the work. Between the first of March and 654] the first of June Mr. Hoffman had to provide for manufacturing the pipe and in order to do that he had to make contracts and did make contracts with a firm where the amount required was some \$180,000, and he also had to and did make contracts for the delivery of the pipe on the ground to the amount of some \$36,000, he had in a general way all the responsibility of the contract, and his partner had no liability whatever on the bond required for the performance of the contract—a bond for about \$140,000 that Mr. Hoffman was required to give to the city. During the progress of the work, when Mr. Hoffman was without funds of his own to meet the demands of the business, he was notified by the water committee that they had not sold their bonds, and had no assurance that they would make sales in time to enable him to pay his bills due in the month of September, amounting to over \$20,000.00, and he was obliged to, and as a matter of fact did, make all necessary arrangements to provide funds in case they were not furnish-

ed by the water committee. Mr. McMullen refused to put in any money and when asked to put up simply notified Mr. Hoffman to stand off his creditors and not to pay the men who furnished him supplies until he got ready, or something to that effect. Now, I would like to ask you to state whether or not in your opinion the services of Mr. Hoffman in that case would be worth any more than in case he was a mere naked superintendent.

(Counsel for complainant object to the question on the ground that it presents an incorrect and incomplete statement of facts.)

[655] A. Well, there are so many circumstances connected with a thing like that.

Q. You can state your general conclusion about it, whether it would or not.

A. Well, I think he would be a little more valuable to the firm than if he was an outside man hired on a salary, inasmuch as his own interests were involved.

Q. Would his services be worth any more to the firm than a man as I have named?

A. I said \$2,500.00; I just guessed it at \$325 to \$350 a month; I did not stop to figure it up. When that question was asked I was asked as to a superintendent, but when it comes to including brokerage and such things as that it would make a difference. It is a separate question.

Q. Answer the question I put to you without reference to other questions.

A. It is a hard thing for me to do, because it is just the same thing as putting a premium on money and such things as that. It is a nice question for a man to answer.

Q. Just state whether in your opinion his services are worth any more in the one case than in the other.

A. I think they would in that case.

Q. How much—can you estimate?

A. That would depend upon the amount of money. Of course he would work for his own interest, for he is bound to do that—every man is bound to look out for his own interest.

Q. How much more was his services worth, if any?

[656] A. Well, I should not consider it worth over \$5,000 a year at that.

Q. That is upon the assumption that Mr. McMullen has his own time to do what he pleases; he is under no obligation to do anything, but if he sees fit to respond to what Mr. Hoffman asks him to do, he does it, but otherwise he is under no obligation to do anything—his time is not taken up.

A. I am not saying anything about McMullen.

Q. Assuming the contract between Hoffman and McMullen to be that Hoffman was to take charge of the business and give it his attention, and Mr. McMullen was at liberty to attend to his own affairs unaffected by this contract so far as their agreement was concerned—now, I will ask you to state whether in that case Mr. Hoffman would be entitled to any more money than you have named.

(Counsel for complainant objects to the question, on the ground that it is based upon a false and incomplete statement of facts as shown by the evidence.)

A. I think I have named what Hoffman ought to have for putting in his time whether Mr. McMullen put in any or not. As I understand this thing it was the agreement that he should put in his time.

Redirect Examination.

Questions by Mr. L. B. COX:

Q. Mr. Aldrich, would the fact that Mr. Hoffman put \$14,500.00 into this job for two or three months more than McMullen put in alter your opinion as to the amount of salary that Mr. Hoffman ought to be paid as superintendent?

A. Well, I do not know as the sum was stated in the question to me. Of course, if he put up that money then of course it is like this, it is a hard thing for me to answer or for anybody else to decide, that should have been the understanding that if he put up money he should be paid for it.

Q. Now, is not the contribution of money by one partner a totally different thing from the allowance to him for his personal services?

(Objected to as incompetent and immaterial.)

A. When I spoke of \$5,000.00 a year it was to provide him for any extra trouble or anything like that.

Q. My question is, is not the contribution of money a different thing from the contribution of personal services?

(Same objection.)

A. As a general thing, nobody without he is interested will hire out with that understanding. They hire out for their services.

Q. Now, then, if Mr. Hoffman put this amount of money into this job more than Mr. McMullen according to the statement made you, would Mr. Hoffman's compensation on that amount of money rest upon Hoffman's personal services, or would it rest upon his being paid interest on the money that he had in the job more than McMullen?

A. That should be in one sense of the word the agreement between them how they should make it.

[658]

Recross-Examination.

Questions by Mr. R. MALLORY:

Q. Suppose that Mr. Hoffman and McMullen were engaged in the execution of the contract which required the outlay of a large sum of money, and when they entered into the contract they agreed together that each should furnish his share of the money, and Mr. McMullen entirely fails to furnish any money at all except in the form of some machinery or supplies that was put on the job, and the whole responsibility of procuring money was put upon Hoffman, and he procures it and carries on the job, when otherwise it might have failed—now, do you not think that Mr. Hoffman is entitled to more pay from McMullen than he would have been if he had been a mere superintendent?

(Objected to by complainant on the ground that it assumes facts not in evidence.)

A. Well, there is another question as I say, because I have seen that thing done before; of course they ought to have compensation for it, but it is hard to put it in a salary.

Witness excused.

PHILIP BUEHNER is recalled as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

[659]

Questions by Mr. L. B. COX:

Q. Have you your contract with Hoffman?

A. Yes.

Q. Will you produce it please?

(Witness produces contract.)

Q. (Con.) This was executed by yourself—is that your signature? A. Yes, sir.

Q. Did you see Mr. Hoffman sign it?

A. No, I did not see him sign it.

Q. Do you know that to be his handwriting?

A. I recognize that as his handwriting.

Q. He acted upon it?

A. Yes, he brought it to me signed.

(Counsel for complainant offer in evidence the first four pages of this contract between Hoffman and Bates and the Wolff & Zwicker Iron Works. Objected to as incompetent and immaterial and not rebutting evidence. It is stipulated that a copy of the pages offered in evidence may be made and substituted in lieu of the original to be filed and marked "Complainant's Exhibit No. 27," G. A. B., Ex.)

Witness excused.

JOHN KIERNAN is called as a witness for the complainant, and being first duly sworn, testified as follows:

[660]

Direct Examination.

Questions by Mr. L. B. COX:

Q. Are you a member of the firm of Cook & Kiernan?

A. Yes, sir.

Q. Is it a corporation?

A. Yes, sir. I am president and manager of the company.

Q. Were you such in the year 1893? A. Yes, sir.

Q. Did you ever have any contract with Lee Hoffman under the firm name of Hoffman & Bates in connection with the manufacture and laying of pipes from Bull Run Creek to Mt. Tabor?

A. I had a contract for hauling pipe.

Q. Have you that contract with you? A. Yes, sir.

(Witness produces contract.)

Q. This was signed by you? A. Yes, sir.

Q. Is that Hoffman's signature appended to it?

A. I am not familiar with his writing. I think it was, though.

Q. He acted on the first three pages of that contract, did he?

A. Yes, sir.

(Counsel for complainant offers in evidence the first three pages of the contract produced by the witness. Objected to as incompetent, irrelevant, and immaterial, and not rebuttal evidence. It is stipulated that a copy of the pages offered in evidence may be made and substituted in lieu of the original, to be [661] filed and marked "Complainant's Exhibit No. 28, G, A. B.," Ex.)

No cross-examination.

Witness excused.

JOHN McMULLEN is recalled as a witness on his own behalf on rebuttal.

Direct Examination.

Questions by Mr. L. B. COX:

Q Mr. McMullen, I will ask you to state what, if anything, you may know about the matter of making a subcontract with the Wolff & Zwicker Iron Works in regard to the manufacture of the pipe that was laid from Bull Run Creek to Mt. Tabor.

(Counsel for defendant objects to the question as immaterial and not rebuttal evidence.)

A. I was in Portland at the time the contract was made; that is, the time it was made verbally. They made a verbal agreement with Hoffman and myself that we accepted, but we could not execute a contract with them until after we got the contract executed with the city. It was executed with the city on the 19th of March, and the contract with Wolff & Zwicker and Hoffman & Bates for the manufacturing was executed on the 11th of March.

Q. You may state whether or not you assisted Mr. Hoffman [662] in arranging that contract and coming to an agreement as to its terms.

(Counsel for defendant objects to the question as immaterial and not rebuttal evidence.)

A. Well, we both canvassed the propriety of doing it, and concluded that we had better do it, inasmuch as it would relieve us of a very large responsibility about furnishing a very large amount of money to build and equip a shop with.

(Counsel for defendant moves to strike out the answer of the witness on the ground that it is not competent testimony.)

Q. What do you know about the Cook & Kiernan contract?

(Counsel for defendant objects to the question as immaterial and not rebutting evidence.)

A. I know that Mr. Hoffman reported to me before he made that contract that he had an offer for doing the hauling and distributing the pipe along the line for the price that we had estimated for this part of the work or a little lower. I think it was a little lower than our estimate. He asked me what I thought about it, and I told him that if they were responsible people he had better close it with them, and he did close it with them then, and he sent me a copy of the contract that he had made with them, as he did also a copy of the contract that he had made with Wolff & Zwicker after it was executed. He sent to San Francisco a copy of them.

Q. What do you know about the plant that Hoffman contributed to this enterprise between June, when it started up, and the 20th of September, 1893?

663] (Counsel for defendant objects to this question on the ground that it is immaterial and not rebutting testimony.)

A. It was some that he had on hand.

Q. You had a certain amount on hand and he had a certain amount on hand?

A. Yes, but I won't say that all that went into the work between June and September was second-hand material, but I think the bulk of it was. I think three-fourths of it was. There was some special tools that were required for this job and some special tools furnished, like forges, hydraulic shears, and some tools for raising the pipe and lowering it into the ditch, which we called "differential blocks."

Q. Did you and Hoffman have any talk about this matter of providing plant?

(Counsel for defendant object to the question as immaterial and not rebutting evidence.)

A. Yes, we agreed that each should put in what each had on hand that was suitable.

Q. Mr. Willis gave some testimony in regard to your having made an assignment some time prior to the execution of this contract between Hoffman and yourself; I will ask you to state whether or not any such thing existed at that time.

A. About seven years before this time the San Francisco Bridge Company made an assignment and which developed into an extension of time, and they would pay in full, but at that time the creditors gave them an extension of time. That [664] was in 1886. At that time that this work was projected the San Francisco Bridge Company was solvent and abundantly able to meet any of its obligations.

Q. Was there any of this old indebtedness or anything of that sort hanging over you at that time?

A. No, sir.

Q. I will ask you to explain the circumstances connected with your failure to supply money to this firm during the summer of 1893 in response to Mr. Hoffman's demand.

(Counsel for defendant object to the question as incompetent and immaterial and not rebutting testimony.)

A. Well, the failure to supply money at the particular time that Mr. Hoffman asked for it, which was in the fore part of September—I think there was a letter in August, but the urgent letters were on the 11th and 16th of September—was on this account: it was then that the financial panic was at its highest and we had quite a large amount of money out. In one place alone we had, I remember, \$30,000 that we were unable to collect, and I so advised Mr. Hoffman and told him that earlier in the season or later I would be able to remit him the money if it was still necessary. I would like to say right here, though, that when we got this contract I proposed to Mr. Hoffman, first verbally and subsequently in writing, that we go to a bank here in Portland and make arrangements for such money as we thought we would need to carry on the job. It was deemed or conceded by both of us that the amount of money required after the subcontract for manufacturing the pipe [665] had been made would be small, and there would have been no difficulty in raising abundant and ample money to carry this job on if Mr. Hoffman had consented that we should take this contract to a bank and show them that in it was an estimated profit of \$100,000, and that the city was good pay, that they pay 90 per cent of the estimates and that after we got started, in two or three months, we would get sufficient estimates to reimburse any loan that we might need, or that we might take out on account of it. The contract itself was a valuable asset

—as much so as this brick building is or any other valuable property. Mr. Hoffman met me with the proposition that “it will be time enough to do that when we need the money.” “Well,” I said to him then, “I do not think that is good policy. I think that as we have entered into this contract we should have funds, which is an essential and important part of it, and that we should adopt that policy now and here.” “Well,” he said, “it is time enough to do that when we need the money.” Well, of course; the upshot of it was that when we needed the money was in the most critical time of the financial panic, and we could not borrow money on government bonds. Then he wrote me these urgent letters that I should furnish and peremptorily put up and advance a sum of money on his say so. His letter of September 11th, in my judgment, misrepresented the facts of the case, and subsequent developments bears it out—the records of the books in the office to-day bear out that this letter misrepresented grossly the needs of the firm. The letter of September the 16th was, in my mind, written premeditatedly for the purpose of laying the foundation to exclude me from this contract. It was not written in good faith. My answer to it shows that the Risdon Iron & Locomotive Works, who had an estimate coming from the same source, and whose place of business was 700 miles from here, were advised that their money would be paid without any question, and that the bonds had been sold and sent away, and that the money would be here to pay as usual, and I so stated in my reply to his letter of the 16th. I did not want to pointedly accuse him of bad faith, but said that as one of the things to show that there was not going to be a default.

(Counsel for the defendant moves to strike out all that part of the answer of the witness commencing with the words, “I would like to say right here,” for the reason that it is irrelevant, immaterial, and impertinent and an argument on the merits of the case.)

Q. Did Mr. Hoffman ever make any response to your statement that you have just mentioned in your letter telling him that he must have known when he wrote that the committee had its money or would have it?

A. He never did.

Q. I will ask you to state, Mr. McMullen, if you ever will.

fully or designedly refused to furnish money to the firm or to this work when it was in your power to do so.

A. I never did.

Q. I show you defendant's "Exhibits U2 and V2," and I will ask you if you have seen papers of that character—just these two sheets.

[667] A. I think I have seen the original of these papers, although I have not seen them for two or three years. I am not sure that these are copies, but I think I have seen the original of these papers.

Q. At all events, you have seen something similar to them?

A. Yes, sir.

Q. Where did you see them?

A. Well, I think I saw them at our office in San Francisco, and very probably I saw them in Mr. Hoffman's office in Portland. I probably brought them there when I came here.

Q. Now, I will ask you to state what that paper was designed for.

(Counsel for defendant objected to the question as immaterial.)

A. This paper was made—the original of it was made primarily to arrive at an approximate size of each contract that the water committee of the city of Portland were going to take bids on the 1st of March, 1893—for the purpose of ascertaining how large a check would be required to accompany our bid for each contract that was to be let. The paper shows on its face—it shows under each item certified check, \$850.00 to \$1,500.00 on the first item.

Q. I will ask you to state whether or not the figures there appertaining to the manufacture and laying of pipe from the head works to Mt. Tabor were designed for any special purpose in connection with the bids, and if so, what the purpose was.

(Counsel for defendant objects to the question as immaterial, as the paper shows for itself what it is for.)

[668] A. They were not at the time these papers were made. We had just commenced investigating the job, and we had very little data on which to predicate any calculation. I said the primary purpose was to ascertain the size of the check required. Now, I do not think it had any other purpose. I think

that was the design and calculation of the papers, because when they were made we had not the data and we did not know accurately the cost of the items which they purported to represent.

Q. I show you defendant's "Exhibit Y2"; I think you have proposed that I will ask you to state what it was designed for.

(Counsel for defendant objects to the question as immaterial, as the paper shows for itself what it is for.)

A. It was designed for my own and Mr. Hoffman's information as to Mr. Catt's judgment as to the cost of making and laying Bull Run pipe. Mr. Catt's judgment was founded on his investigation in the East and this paper was sent here to myself or to Mr. Hoffman, or to us jointly, as an exponent of his judgment on what it would cost to manufacture this pipe and it was not intended in any sense for a bid. It was a calculation to assist us in making up our minds to the sum which we would bid.

Q. You may state whether or not it was your purpose at any time to use that as a bid.

(Counsel for defendant objects to the question as immaterial.)

A. It never was. This paper was followed by additional information the next and second and third days after it came, both by letter and wire, which radically modified its application.

Q. I show the witness a telegram, which has been marked [669] by the examiner "For identification No. 4," being a telegram from George W. Catt to J. McMullen, Hotel Portland, Portland, Oregon, dated the 27th day of February, 1893; you may state what, if any, that message has with the calculation you were making for a bid on the work of manufacturing and laying steel pipe to bring Bull Run water down to Mt. Tabor.

(Counsel for defendant objects to the question as incompetent and immaterial and not rebuttal evidence.)

A. We used the information that this telegram conveyed in making up our final estimate. That is, we used all the information that we could get from every source and this is one of the sources.

Q. Did you receive that in the ordinary course of transmission?

A. Yes, I think I received that the day it was dated.

(Objected to by defendant as incompetent, immaterial, and not rebutting evidence. Counsel for complainant offers in evidence the paper last shown to the witness and the same is received and filed marked, "Complainant's Exhibit No. 29," G. A. B., Ex.)

Q. I show the witness a letter, which has been previously marked "For identification No. 5," bearing date New York, February 22 or 21 (as there are duplicate dated), '93, addressed "J. McMullen, President San Francisco Bridge Company, San Francisco and Portland," signed "San Francisco Bridge Company by George W. Catt"; did you receive that letter in the ordinary course of the mail? A. I did.

Q. I will ask you to state what the paper is referred to there as "Bid DDD."

[370] A. I think it was the paper in evidence here, "Defendant's Exhibit Y2."

(Counsel for complainant offers in evidence the paper last shown to the witness. Objected to by defendant as incompetent, immaterial, and irrelevant and not rebuttal evidence. The same is received and filed, marked "Complainant's Exhibit No. 30," G. A. B., Ex.)

Q. I show witness a letter which was previously marked "For identification No. 6," dated New York, February 22nd, 1893, addressed J. McMullen, President San Francisco Bridge Company, San Francisco and Portland," signed "San Francisco Bridge Company, by George W. Catt"; did you receive that in the ordinary course of business? A. I did.

Q. To what business did it relate?

(Counsel for defendant object to the question as immaterial.)

A. It related to Mr. Catt's calculation and estimate on the pipe line job.

Q. On the second page there is reference to bid DDD, what does that refer to, do you know?

A. That refers to the papers in evidence here as "Defendant's Exhibit Y2."

(Counsel for defendant, in addition to the objections heretofore made, now object to all letters received, on the ground that they are letters received by the witness himself from his own employees and contain declarations to himself by his own employees, and are incompetent, irrelevant, and immaterial

Counsel for complainant offers in evidence so much of the letter referred to as is found on the second page commencing with [671] the words, "Bid DDD," and ending with the words "You may think different about them." Objected to by defendant as incompetent, immaterial, and irrelevant. Paper referred to is received in evidence, filed, and marked "Complainant's Exhibit No. 31," G. A. B., Ex.)

Q. I show the witness a telegram, dated "San Francisco, Cal., 31 '93," addressed "J. McMullen, Portland, Hotel," signed H. S. Wood; state whether you received that in the ordinary course of telegraphic transmission. A. I did.

Q. To what work did it relate?

A. It related to the estimate on the work of laying the Bull Run pipe line.

(Counsel for complainant offers in evidence that portion of the dispatch pertaining to this work of manufacturing and laying steel pipe which reads as follows: "Making and laying three and five four five thousandths cents on net plate weight seems high on shop work and plant by a quarter cent." Counsel for defendant objects to introduction of the same in evidence on the ground that it is incompetent and immaterial, and further suggests that if the paper is admitted the whole of the dispatch from the beginning ought to be received. Counsel for complainant states that he is willing the defendant may offer the entire dispatch or that it may otherwise be received in evidence, but complaint only offers in evidence so much of it as relates to the manufacture and laying of this pipe. The paper referred to is received in evidence and marked "Complainant's Exhibit No. 32," G. A. B., Ex.)

Q. I show the witness a letter dated New York, February [672] 21st, 1893, addressed "J. McMullen, President San Francisco Bridge Company, San Francisco and Portland," signed "San Francisco Bridge Company, by George W. Catt"; did you receive that letter in the ordinary course of business?

A. I did.

Q. To what did it relate?

(Objected to by counsel for defendant on the ground that the letter shows for itself and as being immaterial.)

A. It relates to the calculation that Mr. Catt had previously sent me—the paper "Exhibit Y2" for the cost of the manufacture and laying of pipe.

(Counsel for complainant offers in evidence the paper last shown to the witness. Counsel for defendant objects to the same as being incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed marked "Complainant's Exhibit No. 33," G. A. B., Ex.)

Q. I show the witness a letter, dated New York, February 21st, 1893, addressed "J. McMullen, President San Francisco Bridge Company, San Francisco and Portland," and signed "San Francisco Bridge Company, by George W. Catt"; did you receive that letter in the ordinary course of mail?

A. I did. (Signed) J. McMullen.

Q. To what work does it relate?

(Objected to by counsel for defendant, on the ground that the letter shows for itself and as being immaterial.)

A. It relates to the estimates that Mr. Catt made for the manufacture and laying of pipe "Exhibit Y2."

(Counsel for complainant offer in evidence the paper last [673] shown the witness. Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed, marked "Complainant's Exhibit No. 34," G. A. B., Ex.)

Q. I show the witness a letter dated New York, February 21st, 1893, addressed "J. McMullen, President San Francisco Bridge Co., San Francisco and Portland," signed "San Francisco Bridge Company, by George W. Catt"; did you receive that letter in the ordinary course of business mail?

A. I did.

Q. To what does the last paragraph relate?

(Objected to by counsel for defendant as immaterial and on the ground that the letter shows for itself.)

A. It relates to calculation of the cost of manufacturing and laying the pipe—"Defendant's Exhibit Y2."

(Counsel for complainant offer in evidence the following paragraph of the letter referred to, to-wit: "We enclose herewith copy of letter from Fuller Bros. & Co., 139 Greenwich St., New York, reference to steel rivets, which is the best price we have up to date." Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons

in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed marked "Complainant's Exhibit No. 35," G. A. B., Ex.)

Q. I show you a letter dated New York, February 21st, 1893, having a similar address and signed in the same manner; to what work does that relate?

[674] Objected to by counsel for the defendant as immaterial and on the ground that the letter shows for itself.)

A. It relates to the estimates of Mr. Catt on the cost of manufacturing and laying this pipe—"Defendant's Exhibit Y2."

Q. Did you receive it in the ordinary course of mail?

A. I did.

(Counsel for complainant offers in evidence the paper last shown to the witness. Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed marked "Complainant's Exhibit No. 36," G. A. B., Ex.)

Q. I show the witness a letter dated New York, February 21st, 1893, same address, same signature; did you receive that letter in the ordinary course of mail? A. I did.

Q. To what work did that relate?

(Objected to by counsel for defendant as immaterial and on the ground that the letter shows for itself.)

A. It relates to Mr. Catt's calculations as to cost of manufacturing and laying pipe—"Defendant's Exhibit Y2."

(Counsel for complainant offers in evidence the paper last shown to the witness. Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed marked "Complainant's Exhibit No. 37," G. A. B., Ex.)

[675] Q. I show the witness a letter dated New York, February 22nd, 1893, same address and same signature; state whether or not you received that letter in the ordinary course of mail.

A. I did.

Q. To what does it relate?

(Objected to by counsel for defendant as immaterial and on the ground that the letter shows for itself.)

A. It relates to Mr. Catt's calculations or estimate of the

cost of manufacturing and laying pipe—"Defendant's Exhibit Y2."

(Counsel for complainant offers in evidence the letter last shewn the witness. Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The letter referred to is received and filed marked "Complainant's Exhibit No. 38," G. A. B., Ex.)

Q. Mr. McMullen explain the significance of those letters offered in evidence being addressed to both Portland and San Francisco and Portland.

[676] (Question objected to as immaterial.)

A. The copy that was sent to Portland was sent here because the signer knew that I would be here at the time, and the copy that was sent to San Francisco was simply sent for the information of that office.

Q. I will ask you to state whether or not you got a copy of these letters and telegrams at the time the bids were submitted by yourself and Hoffman on the manufacture and laying of this pipe? A. I did.

Cross-Examination.

Questions by Mr. MALLORY:

Q. These papers to which your attention was drawn—I think it was "Defendant's Exhibit U2 and V2"—by whom was the original of them made, if you know?

A. Do you mean the clerical work?

Q. The estimate itself of the Engineer.

A. By Mr. Wood, I think.

Q. You say at that time Mr. Wood did not know and did not have the data from which to make any accurate estimate of the costs of the work? A. I said so; yes, sir.

Q. That you state as a fact.

A. I think that is correct, sir.

Q. So on the question of the manufacture of the pipes you did not have sufficient data to know what it would cost, did you?

A. I think Mr. Wood made those, as I testified on my direct examination, to find out approximately the size of the different contracts that the committee was going to take bids on, for the

purpose of ascertaining how large a check it would be necessary for me to bring with me.

Q. You have stated that before. I ask you now whether or not he had sufficient information to enable him to form an opinion as an engineer as to what would be the cost of manufacturing the pipes.

[677] A. He had some information, but he did not have full and complete information which was subsequently received.

Q. Referring to that portion of your testimony which begins with the remark, "I would like to say right here," I would like to ask you to state who was present when you had the conversation that you have referred to between yourself and Mr. Hoffman.

A. I do not remember that any one was present. I think that one of the conversations on that subject took place in the old Hamman Baths down on First street. We went down there one evening together to take a bath.

Q. I did not ask you where; I asked you who was present.

A. I do not remember that any one was present.

Q. You make these statements now, Mr. McMullen, with the entire realization of the fact that Mr. Hoffman has been dead for six months, and cannot confront them if they are not true.

A. My dear sir, I made these statements when Mr. Hoffman was alive, and I made them in ink, and you have got them in this case.

Q. I want to ask the witness if he knows to what the words "Bid A." refer which appear in one of the telegrams here.

A. I do not know, but I think if you take the water committee's specifications you can find out what "Bid A" is. I have not got it in mind; I suppose it refers to that letter of the specifications, although it might not, because Mr. Catt has taken "D D D," which is not a letter used in the specifications. It is a letter which he adopted himself to designate between iron conduit and steel conduit. Now, there might be something in the correspondence that will show what "Bid A" refers to. It might refer to a letter in the specifications.

[678]

Redirect Examination.

Questions by Mr. L. B. COX:

Q. What is the fact about the engineer of the water committee sending out printed proposals for different parts of the work, which was scheduled as "Bids A, B, C, D, etc."?

A. He did send out such printed specifications and a blank for proposals.

Recross-Examination.

Questions by Mr. R. MALLORY:

Q. When did he send these and when did you receive them?

A. Well, I think we received the specifications in which those letters were used almost immediately when they were published—in probably two or three weeks.

Q. Mr. Wood when he made this estimate must have had those specifications before hand.

A. Yes; Mr. Wood must have in all probability have had the specifications in San Francisco.

Q. That was the same specification that Mr. Catt had before him when he made his estimate?

A. I think so; yes, sir.

Q. And Mr Bush?

A. Yes; I do not think there was but the one specification which was on a printed form. I know that we got them.

[679] Witness excused.

Whereupon the taking of testimony herein is adjourned until to-morrow, February 1st, 1896, at 10 o'clock A. M.

(Signed)

GEO. A. BRODIE,

Examiner.

(Signed)

J. McMULLEN.

Office of G. A. Brodie, Portland, Oregon.

February 1, 1896, ten o'clock A. M.

At this time, pursuant to adjournment, appear the parties herein as before, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

JOHN B. DAVID is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation, Mr David?

A. Well, now I am farming.

Q. Have you ever had anything to do with contract work?

680] A. Yes, I have been about all my life up to the last three years.

Q. What length of time have you followed that business?

A. Well, about twenty-five years.

Q. What has been the nature of the contracts with which you have been connected—enumerate some of them?

A. Well, I built roads—Government works of different kinds, improvements, mill construction, railroads, etc.—general contract work.

Q. State the magnitude in money of some of the contracts that you have been connected with.

A. Well, the largest contract was building the road from Pendleton to Huntington. I was with Mr. Steel and Mr. Thompson; I had a quarter interest in it.

Q. What was the amount of money involved in that contract?

A. Well, something over three million dollars.

Q. Name the amount of some other contracts approximately.

A. Well, we were interested in different contracts here in Government work, from fifty to one hundred and fifty thousand dollar contracts.

Q. Did you have anything to do with the contract of supplying stone to the government for work on the Columbia River?

A. Yes, I had an interest in that contract.

Q. Who were your associates?

A. Mr. Hinkle, Mr. Thompson, and Mr. Hoffman.

Q. Lee Hoffman? A. Yes, sir.

[681] Q. What was the amount of that contract, do you remember?

A. Well, the amount of the contract was \$50,000.00, but we did about \$150,000.00 worth of work; it run along from one year to another. We also had a contract before that for putting in these dykes and the work done here on the Willamette river, under Colonel Gillespie, which amounted to about \$75,000.00---Joe Pacquet, Joe Smith and I.

Q. Have you been familiar during the time that you have been engaged in these contracts with what would be the reasonable price for the services of a superintendent and general manager?

A. Well, yes, to a certain extent I have kept myself pretty well posted.

Q. Where were you in the summer of 1893?

A. I was here in Portland.

Q. What was the financial condition here in Portland and generally throughout the country during that summer commencing along in July?

A. Well, it was pretty uncertain; that was the beginning of the panic; I would say it was panicky.

Q. And after the panic how was money?

A. Well, money was pretty hard to get hold of---was very close.

Q. What effect did that have, if any, on salaries, wages, the compensation paid for services, and everything of that sort?

[682] (Counsel for defendant objects to the question as immaterial, unless it is limited to the matter of services as persons engaged as manager in charge of contracts, and having control of men, and furnishing means.

A. Well, at that time of the year I do not think it had very much effect upon people who had positions of trust, and so forth, because it had not run quite far enough, but it affected common labor; for instance, before that men who were employed at \$2.50 a day during that time it was a dollar and a dollar and a half; it nearly cut their wages in two; but for superintendent I do not think it affected their wages very much at that time.

Q. I desire to submit this question to you, Mr. David, and take your opinion upon it: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland, under a contract which stood in Hoffman's name. The contract price was \$465,667.00, and the contractor was required to furnish a bond in the sum of \$140,000.00, which bond was secured by Hoffman, the securities being two in number, one a former partner of Hoffman's, and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of the capital to the prosecution of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland should be the active superintendent of the work, but that McMullen, who resided in San Francisco and controlled offices there and in New York and in Seattle, should render all services which should be required of him at those points. The work of manufacturing the pipe was sublet at a price of about \$180,000.00, and the work of hauling the pipe into position was also sublet at a price of about \$36,000.00. The work was actually begun in June, 1893, and between March 10, 1893,—the date of Hoffman's contract with the water committee—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work was also engaged in other contract operations. Of the plant, consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20th, 1893, Hoffman found 2-3 and McMullen 1-3, the value of the latter being estimated from \$1,609.00 to \$2,300.00. Owing to his inex-

[684] perience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made by Hoffman, except in the matter of furnishing money, until September 20th, 1893. During this time an engineer and a superintendent of the field work together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned; but Hoffman advanced from his private means at various times in the months of June, July and August, 1893, the sum of \$14,500.00 or thereabouts, which was covered by his estimate paid by the water committee on September 21, 1893, and thereafter Hoffman did not have, or need not have had, any money of his own in the job. Money was very tight, and salaries and wages were affected thereby as you have testified. In the partnership contract between Hoffman and McMullen, there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts what do you deem to be a proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of time between March 6, and September 20, 1893?

(Counsel for defendant objects to the question for the same reasons as made to the same question when propounded to other witnesses.)

A. Well, the ordinary wages for people superintending that kind of contract is from \$200 to \$400 a month. Of course his putting up money that has no effect upon his wages or upon his salary, that is a matter independent of that. I should think \$400 a month would be a fair compensation.

[685] Q. Do you know, Mr. David, within your own experience, any instance in which salaries were allowed to persons occupying toward other pieces of work the relation which Hoffman occupied towards this work, as indicated in the question just submitted?

(Counsel for defendant objects to the question as irrelevant and immaterial.)

A. Well, I do not know of any such large contract; of course, I know other men were working on the same contract --that is, this same general contract with the water commit-

tee, and the salaries that they got. For instance, Mr. Hinkle, who superintended the laying of pipe across there, he got \$10.00 a day, while he was at work, and he was interested in the contract with the other boys. They arranged that themselves, all three of the contractors were under wages—under salary.

Q. Do you know of any instance in which one member of the firm or stockholder in the corporation which had a contract who acted as superintendent and general manager, and was allowed a salary for such services?

(Same objection.)

A. Yes, I know of a number of cases of that kind; I have had some experience with them myself.

Q. Give us the benefit of your observation?

(Same objection.)

A. Well, when we were in the government work furnishing stone, we paid Mr. Hinkle, who took charge of it, \$150.00 a month, and his expenses, and Mr. Hoffman was one of the partners, and when we were working on the railroad and doing the railroad work there, Mr. Bates, who was superintendent, got \$250.00 a month for general superintendent of the work.

Q. What interest had Bates in the work?

86] A. He had a 1-3 interest.

Q. What was the magnitude of the work that he performed?

A. He did that work from Pendleton to the summit of the Blue Mountains. It was pretty heavy railroad work and he had from eleven to twelve hundred men under him.

Q. What was the cost of that work.

A. I do not know exactly what his payroll was.

Q. The contract—what was your estimate as a whole?

A. Well, you know we did it at so much per yard; I cannot tell you exactly.

Q. Approximate it.

A. The estimate would go from \$65,000.00 to \$150,000 a month.

Q. How long did that last?

A. We were about eight months in finishing it; but of course, it did not run that all the time; the fore part it was smaller, and the latter part it was smaller, but during that

time there were two or three months that run from \$65,000.00 to \$150,000.00 a month.

Q. What was Hinkle doing in superintending this work that you described?

A. He had the getting out of this rock, and opening up the quarry. I suppose our plant cost about \$25,000; we kept sixty-five or seventy men there.

Q. Well, what was his duties—how much latitude was there in his action—what did he have to do?

A. He had it all to do; we had nothing to do with it at all, [687] except we went in and furnished the bond, and he did the business.

Q. Now, then, do you know of any other instances except these two.

A. Well, I have known of other instances, but I do not call them to mind. This work that we done down here on the Willamette under Col. Gillespie, we bired an outside man who was not interested.

(Counsel for defendant here enters a general objection to all questions propounded to this witness, on the ground that the same are immaterial, irrelevant.)

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. When Mr. Hinkle was acting as superintendent, as you spoke of him, he was simply superintendent of the works: he was not responsible in any way by having to provide money for the men at all; the matter of paying them was the business of the Company, and he had nothing to do with that, did he—providing the money to pay them?

A. No, he had nothing to do with providing the money of course, he regulated the wages, and all that.

Q. But with providing the money to pay them he had nothing to do?

A. No more than the rest of us.

Q. Simply the corporation did it, or the company?

A. Yes.

Q. So that his duties as a superintendent did not make it [688] incumbent upon him to look out for funds to pay the men?

A. No, no more than his interest as a member of the company.

Q. In the case of Mr. Bates, his services were simply that of a superintendent engaged in controlling the men?

A. Yes, sir.

Q. And in directing the work?

A. Yes, sir.

Q. So far as looking out for funds to pay the men, he had nothing to do with that?

A. No more than simply to provide his part.

Q. As a member of the company? A. Yes.

Q. In case of failure, it was not a matter that devolved upon him as superintendent—he would not suffer from that he had not responsibility on that account? A. No.

Q. So that the services these men that you referred to performed, and the wages paid to them was simply to look after and carry on the work, and see that the men did the work properly and were kept employed, and were made to do as much work as they could to get the best results from the men that were employed?

A. Yes. Well, Mr. Hinkle was a little different from Mr. Bates; Mr. Bates did not have to do anything with the planning, that was furnished by the engineer of the railroad company, but Mr. Hinkle had to do his own planning—he did everything except furnishing the money.

389] Q. The work he had to do was to plan the getting out of the stone? A. Yes, sir.

Q. How he would get the stone out, that was this work?

A. Yes, sir.

Q. Now, Mr. David, suppose the water committee of the city of Portland awarded to Mr. Hoffman, under the name of Hoffman & Bates, a contract for manufacturing and laying pipe for conducting water from the head works at Bull Run to Mt. Tabor, for which it was agreed that Hoffman should be paid \$465,667.00, and a bond was required of Mr. Hoffman to the amount of \$140,000.00. There was a contract of copartnership entered into between McMullen and Hoffman, the complainant and defendant in this suit by which it was agreed that each would put up one-half the money necessary to carry on the work, and should share the profits of the work if there were any. Hoffman living in Portland was to have charge and management of the business, and McMullen not living in the city was to give such aid as Mr. Hoffman should

ask him to at points where he did business. Mr. McMullen did not give and refused to give any assistance in procuring a bond. Mr. Hoffman had to furnish the bond entirely himself, and Mr. McMullen did not even sign it, and was under no obligation, so far as the bond was concerned, to the city water committee at all. Mr. McMullen or the San Francisco Bridge Company of which he was the managing director and principal stockholder, had a lot of tools, camp equipments and utensils necessary for work of this sort, at Seattle, the value of which was from \$1,200 to 1,500, which was turned over to Mr. Hoffman to help carry on the work. Mr. McMullen, at the request of Mr. Hoffman, purchased in New York a hydraulic punch and shears, the cost of which [690] was about \$300.00; he also purchased, at the request of Mr. Hoffman, some portable forges in San Francisco; a dozen or more; that these were paid for out of the funds of the company. Between the first of March and the first of June, Mr. Hoffman had to prepare for manufacturing the pipe, either to do it themselves—himself and McMullen, or to let a contract to have it done; he let a contract to Wolff & Zwicker, the amount of which was about \$180,000.00. He also provided for hauling the pipe from the place of manufacture, to the place of use, and for that purpose made a contract amounting to about \$36,000.00. This work was done by him between the 1st of March, and the 1st of June. The work of laying the pipe actually begun in the month of June and between June and September 20th Mr. Hoffman put into the concern about \$14,500. Mr. McMullen did not put in a dollar other than that named. And when requested by Mr. Hoffman to put up his proportion according to contract, he refused to do so, and in his refusal complained of Hoffman because he paid his bills, and provided money for that purpose, and did not send them off—not referring to his payrolls; but to other contracts—supply contracts. Payments were made for the work upon estimates furnished by the chief engineer of the water committee. The amount of bills to be paid on the 20th of September would have been about twenty thousand dollars or a little more. On the 20th of September, Mr. Hoffman was invited by the water committee to be present at a meeting of said committee, and was then and there notified that there was no certainty that any bonds would be sold or that any money

391] could be had to pay the obligations due on the 20th of September, in consequence of which Mr. Hoffman having a large number of persons in his employ, was obliged to provide for money to meet these obligations, and did in fact, make provisions for procuring it—collected all the money he could get of his own, and in fine had the entire responsibility of this contract on his own shoulders. The work was carried to a successful conclusion, and according to the showing of the books, a large profit was realized from the investment. Mr. Hoffman's whole attention was directed to and actually applied to the management of this business, not however, so much that he could not look after his ordinary business. Mr. McMullen was entirely at liberty to attend to his own affairs and prosecute his other business as he pleased, only being expected to do such things as Mr. Hoffman might ask him to do, and he did in fact ask him to do some chores, such as has been named, and consulted with Mr. McMullen with reference to the business as it went along. Now, under these circumstances I will ask you to state what in your judgment was the value of Mr. Hoffman's services to that concern.

(Counsel for complainant objects to the question, on the ground that it presents an incorrect and incomplete statement of facts as shown by the evidence.)

A. Well, that is a peculiar situation; of course, so far as providing for those means and all that thing is concerned, that should be paid for. That seems to me to be a matter by itself. I do not know how, whether it should be paid for in a salary or in any other way, that is a pretty hard question.

[692] Q. I will put this question to you: in view of the circumstances which I have stated to you substantially, would you think that it was any more than fair compensation to Mr. Hoffman for Mr. McMullen to allow him out of his share for doing that work a salary of \$500 a month, leaving Mr. McMullen free to attend to his own business?

(Same objection.)

A. No, I do not think that would be unreasonable. If that would cover the accommodation of furnishing the money, I think it would be worth a little more for putting up that money and keeping the work going.

Q. I am asking you to take into consideration the responsibility of the position, and the liability that Mr. Hoffman

would incur to his employees upon the ground—taking the responsibility that such a person does under such circumstances, and you know the temper of the people who are employed in such contracts of that kind, and taking all these things into consideration, I ask you to state whether the fact that Mr. McMullen was entirely away from the work and away from all that responsibility, and had his mind free to look after his own private affairs—whether \$500 a month from him would not be reasonable compensation.

(Counsel for complainant objects to the question, on the ground that it is based upon an incomplete statement of facts, and as appears by the evidence, and as immaterial.)

A. Well, the question there about furnishing the money cannot enter into the question of salary, it seems to me.

[693] Q. I do not ask you about that; I want you to consider the responsibility—what his services were worth when he had that responsibility upon his mind; the money itself is a different item.

A. I suppose that \$500 a month would not be too much under those circumstances, taking the whole thing into consideration.

Redirect Examination.

Questions by Mr. L. B. COX:

Q. Now, Mr. David, you are assuming in giving that answer that Mr. Hoffman was entirely and solely liable for any miscarriage of the contract, and that any loss which might have occurred would fall upon him, and McMullen was powerless to render him any aid, and had thrown the whole thing upon Mr. Hoffman, and that Hoffman had had a greater burden imposed upon him than he ought to have had under his contract, are you not?

A. Yes.

Q. Now, what would you say if the contract between McMullen and Hoffman was that Hoffman by their agreement was to act as general superintendent and to do whatever was required to be done or would have been required to be done by a superintendent or general manager of the work, and that McMullen, as his partner was just as much responsible for any loss that might have fallen on account of the job as Hoffman was, and would have had to stand half of it, and that McMullen's failure to sup-

ply money was on account of his inability to raise it owing to the financial panic of 1893, and that the whole trouble Mr. Hoffman had was with regard to his September payment [694] which was made him in full by the water committee, he owing at that time about twenty-one thousand five hundred dollars, and the payment to him by the water committee was sixty-six thousand seven hundred dollars, and he never thereafter had a dollar in the job, but on the 20th of September, he assumed the entire management of the job, and undertook to oust his partner out of it, that the only money that he advanced was fourteen thousand five hundred dollars, half of which was incumbent upon him to advance, and that was in the job only about sixty days on an average—under those conditions would the first estimate which you gave be influenced any?

A. Well, as I said in the beginning, take an ordinary contract four hundred dollars or three hundred and fifty dollars a month is a little above the average wages. But to provide for those contingencies, of course, I cannot tell you; I am not well enough posted on the contingencies, the way you recite it and the way Mr. Mallory recites it, to give an opinion.

Q. Now, you have given one opinion.

A. Yes, but if he is called upon, under those circumstances, and he has to rustle, and to make provision for all those conditions, and under the conditions that existed at that time, and it required extraordinary effort on his part, and of course I presume he had to sacrifice some things in order to do it; I know I had to in order to raise money.

Q. You are taking that into consideration?

A. I am taking that into consideration, and basing my opinion on the condition of affairs at that time. [695]

Q. Now, Mr. David, assuming the condition of affairs and circumstances under which Mr. Hoffman was placed, were as indicated in my last question, what would you say?

A. As I say, four hundred dollars a month would be a good salary—a fair salary, and more than average salary—about three hundred dollars a month was the average salary for a man to take that place.

Q. Do you think that would cover all the compensation which should be allowed Mr. Hoffman under the condition of affairs which I have recited? A. Yes.

Q. Now, Mr. David, you say that Bates in his contract had

no responsibility as to money, and Hinkle had no responsibility as to money, or losses—each one of them was responsible, was he not, in proportion to his interest in the contract?

A. Yes, that is what I said.

Recross-Examination.

Questions by Mr. R. MALLORY:

Q. I did not ask you, Mr. David, whether Mr. Bates or Mr. Hinkle were responsible for losses; what I asked you was if, under their agreement to superintend, they had any responsibility about furnishing the money—if that was part of their contract as superintendent at all.

A. Well, they were interested in the contract as partners.

(696) Q. That was a different matter; their contract as superintendent was an entirely different matter from their interest in the partnership—that is, when Mr. Bates and Mr. Hinkle were employed as superintendent of this work; it was not a part of their business as such superintendent or manager to go out and hunt up money to be ready to pay the men when their wages became due?

A. No, sir.

(Signed)

JOHN B. DAVID.

Witness excused.

Complainant Rests.

(Signed)

Defendant Rests.

GEO. A. BRODIE, Examiner.

United States of America, }
District of Oregon. } ss.

I, Geo. A. Brodie, U. S. Examiner of the Circuit and District Courts of the United States for the District of Oregon, do hereby certify that on the 7th day of January, 1896, at the hour of 2 o'clock P. M., there appeared before me, at my office in the city of Portland in the district aforesaid, the complainant herein by Mr. L. B. Cox, of counsel, and the defendant herein by Mr. Rufus Mallory, of counsel, and thereupon I proceeded to take the testimony of the respective parties herein, and not having completed the same upon said day the taking of said testimony was adjourned from day to day until the 1st day of February, 1896, when the taking of said testimony was com-

[697] pleted by the respective parties in the above-entitled cause. That by agreement of the parties herein said testimony was taken by question and answer, first by me in shorthand and thereafter transcribed upon the typewriter. That before proceeding with the taking of the testimony of the respective witnesses they and each of them were by me duly sworn to tell the truth, the whole truth and nothing but the truth in answer to interrogatories and cross interrogatories to be propounded to them; that after the said testimony was taken and transcribed as aforesaid, the same was by said respective witnesses read over and signed by them respectively in my presence. I further certify that the foregoing is the testimony so taken by me together with the exhibits introduced by the respective parties during the taking of said testimony. That at each and all of the hearings before me for the taking of said testimony the complainant appeared by Mr. L. B. Cox, of counsel, and the defendant by Mr. Rufus Mallory, of counsel.

In witness whereof I have hereunto set my hand this 6th day of February, 1896.

(Signed)

GEO. A. BRODIE,
U. S. Examiner

Complainant's Exhibit No. 1.

McMULLEN, }
vs. }
HOFFMAN. }

[698] This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run Water system for Portland, submitted the lowest bid for said work and expects to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid.

It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to fur-

Julia E. Hoffman, Executrix, etc.

and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom;

And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland the profits and losses thereof shall in the same maner be shared and borne by said parties equally share and share alike.

Witness our hands and seals this 6th day of March, A. D. 1893.

JOHN McMULLEN. (Seal)

LEE HOFFMAN. (Seal)

In presence of:

P. L. Willis,

R. E. Sewall.

[699] [Endorsed: Filed Feb. 20, 1896. J. A. Sladen, Clerk.]

Complainant's Exhibit 15

Portland, Or. Jan. 1, 1894.

Hoffman & Bates, Contractors, Dr., To Lee Hoffman.

For salary from May 1st, 1893, to Jan. 1st, 1894, as per bill attached, \$8,000.00, eight months at 1000.00 per mo. -

H. & B., Dr., To Lee Hoffman.

For salary from May 1st, 1893, to Jan. 1st, 1894. Eight months. \$1,000 per month, \$8,000.

Jan. 10, 1894.

Received from Hoffman & Bates, Eight thousand dollars, in full for above account.

LEE HOFFMAN.

[Endorsed]:

Hoffman & Bates, Contractors.

Registered in General Office. No. 514. \$8,000.00

Name Lee Hoffman, Place, Portland, Ore

For salary to Jan. 1st, 1894. Month of Jan. 94.

When paid, Jany. 10th, 1894.

Chargeable to Incidentals (Bull Run Pipe Line), \$8,000.

I certify that the within account is correct. A. Donnell.

Computations examined by E. M. Arthur. Approved, Lee Hoffman.

McMullen v. Hoffman, Compts. Ex. 15, Filed Jan. 15th, 1896,
G. A. B., Ex.

Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[700]

Portland, Oregon, Sept. 30, 1894.

Hoffman & Bates, Contractors, Dr., To Lee Hoffman.

For salary from Bull Run Pipe Line contract,

for the year ending January 1, 1895.12,000.00

For credit balance, as per Ledger account,

page 51, General Ledger15,663.30

\$27,663.30

Complainant's Exhibit 16.

Portland, Ore., Oct. 12, 1894.

Received from Hoffman & Bates, twenty-seven thousand six hundred and sixty-three and 30-100 dollars, in full for above account.

LEE HOFFMAN.

[Endorsed]:

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Registered in General Office. No. 1009, \$27,663.30.

Name, Lee Hoffman, Place, Portland, Oregon.

For salary and ledger bal. Month of Sept. account 94.

When paid, Oct. 12, 1894.

Chargeable to (Bull Run Pipe Line.)

Incidentals, 12,000.

Lee Hoffman account, 15,663.30.

I certify that that the within account is correct, A. Donnell.

Computations examined by E. M. Arthur.

Approved, Lee Hoffman.

McMullen v. Hoffman, Compls. Ex. 16. Filed Jan. 15, 1896
G. A. B., Ex

Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[701]

Complainant's Exhibit 17.

Portland, Or., Jan. 14, 1895.

Hoffman & Bates, Contractors, Dr., To Lee Hoffman.

Received from Hoffman & Bates, eight thousand eight hundred fifty-five and 4-100 dollars, in full for above account.

Julia E. Hoffman, Executrix, etc.

[Endorsed]:

Hoffman & Bates, Contractors.

Registered in General Office. No. 1176, \$8,855.04.

Name, Lee Hoffman, Place, Office, For advance.

Mon of Jan. account, '95. When paid, Jan. 14th, 1895.

Chargeable to (Bull Run Pipe Line). Lee H. 8,855.04.

I certify that the within account is correct, A. Donnell.

Computations examined by D.

Approved Lee Hoffman.

McMullen v. Hoffman, Compls. Ex. 17. Filed Jan. 15th, 1896. G. A. B., Ex.

Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 18.

[702]

Portland, Or., Feby 9, 1895.

Hoffman & Bates, Contractors, Dr., To Lee Hoffman.

Advanced, to be deposited with Ladd & Tilton for 3 months on 3% interest bearing certificate, \$60,000.00.

Portland, Or., Feby 9, 1895.

Received from Hoffman & Bates, sixty thousand dollars in full for above account.

[Endorsed]:

Hoffman & Bates, Contractors.

Registered in general office. No. 1197, \$60,000.

Name, Lee Hoffman, Place, Portland, Oregon.

For Adv. for deposit L. & T. Month of January account, '95.

When paid, Feb. 9, 1895.

Chargeable to (Bull Run Pipe Line) Lee H. account \$60,000.

I certify that the within account is correct. A. Donnell.

Approved, Lee Hoffman.

McMullen v. Hoffman, Compls. Ex. 18. Filed January 15th, 1896. G. A. B., Ex.

Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 21 1-2.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, Oregon, March 16, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

[03] Dear Sir: Your letters of the 13th and 14th inst. at hand and contents noted. I have just heard that Wolff & Zwicker were going to buy Risdon out; this came through Buehner, but I can't say how reliable it is. I think as you do, that the Risdon will not sell out unless they get the bulk of the profit, and I would not be in favor of paying them over \$15,000. I am not as anxious now since Wolff makes the pipe, as the controlling of the shipments would do us no good now.

About the trenching, I think we might get up a machine that would do the work cheaper than you could do it with men. I would like to see Kelso and have a talk with him. I think your Mr. Wood has brains enough to plan out some kind of a machine that would do the work cheap. Mr. Grandahl of the S. P. R. R. Co. here has worked out a machine, or is working it out, that works on the same principle of a rotary Snow Plow. Put cutters on a large timber just the size of the ditch and have it work on an incline; always dig the bottom of the ditch first and then after the screw brings it to the top and conveys the earth to the sides by elevators. You see what Wood thinks about this. I think it would pay us to look into machinery for excavating.

I don't care to buy you out now. I think our contract is good, and we will make much more than you ask, but as it is a new line of work I want your assistance. From all I can learn, I believe we can put the pipe in the ditch for the prices we estimated. We got the estimate of Catt, Wood & Bush and afterwards from Dwyer and Wolff and they came out about the same.

[04] I will enclose you under separate cover contract with the city and Wolff & Zwicker all attached, also of Catt's correspondence, map of the pipe line and profile plan. I expect to get another profile plan on natural scale, as soon as it is made, and will send you a copy of it.

I think we can sublet the grading and make some money on it. Let me know what you think about subletting it.

We received the photographs you sent and think they are very good. Please accept our thanks for the same.

Mrs. Hoffman wishes to be remembered to your good wife and yourself.

Yours very truly,

LEE HOFFMAN.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 22.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, August 2d, 1893.

J. McMullen, Esq., San Francisco.

Dear Sir: Yours of the 29th at hand. I think the Risdon are putting it on with their machine, and I am sure they will not make anything by it as they want some favors from us and it will come back to them, but from the way it looks now I think we will have to have it, that is I will let you know after the 5th whether we want it. The water committee have not [705] yet sold their bonds, and from present appearances I don't know if they can dispose of them. I will know by the 5th if they can raise \$100,000 to pay last month bills, and if they do I will go right ahead at the same rate we are going now, if not will shut down. I want you to let me know by wire as soon as you get this the size of the air compressor the Risdon have got and the size of the air reservoir; will the compressor run two machines with 500 feet of hose for each machine; this is the capacity we ought to have. You find out this by the Risdon folks; I suppose it is going to cost us more to rig up this machine than it will to do the thing by hand if we could get the men; we have only got 2 calkers to work and only 5 gangs of riveters, but I am not much in a sweat to put on more men until I know how the committee will act. We are getting along very well now with the work. We got three miles of pipe in the trench this last month but we have gone way behind on the trenching, but hope it will go better this month.

Yours very truly,

LEE HOFFMAN.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 23.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, Oregon, April 28th, 1893.

Geo. W. Catt, Esq., V. P. San Francisco Bridge Company,
World Building, New York City.

Dear Sir: We have your letter of 18th inst. and catalogue of
[706] the W. & S. Hydraulic Co. We have decided to order one each
of the hydraulic punch and shears, as the hydraulic tools will
be much more convenient for our use, than those with long
levers.

The punch No. 1, with $2\frac{1}{2}$ in. jaw, P. 46, will answer our purpose, except it would be better if the casting had a bottom flange as shown on sketch for shears, enclosed herewith, so that it could be securely bolted down to timber on wagon on which it will be used.

Probably they will want to send us the punch with wrought iron legs as shown in catalogue. If so, these legs must be securely fastened to punch casting and provided with holes for $\frac{3}{4}$ in. bolts in the bottom ends. You have the specifications for this work which call for 8-16 in. holes for 7-16 in. rivets, 9-16 in. holes for $\frac{1}{2}$ in. rivets, 11-16 in. holes for $\frac{3}{8}$ in. rivets, so that we should have 8-16 in. dies and 15-32 in. punches for 7-16 in. rivets, 9-16 in. dies and 17-32 in. punches for $\frac{1}{2}$ in. rivets, 11-16 in. dies and 21-32 in. punches for $\frac{3}{8}$ in rivets and you had better order $\frac{1}{4}$ dozen dies and $\frac{1}{2}$ dozen punches of each size.

The hydraulic shears should be something like enclosed sketch. As we may need to split narrow sheets it would have about 6-inch gap. If we mark off the holes in bends in the field we shall not straighten them out to shear and punch them but have the bottom shear blades curved as shown for 2 diameters of pipe 33 inches and 42 inches. The 35-inch pipe is near enough to 33-inch to use same blade.

If it is going to cost much more time and money to get this casting with bottom flange as shown you may send one with good strong legs same as shown on punch.

[707] We do not see the advantage of extending lower jaw of punch as sketched by you unless you support it underneath.

We inclose copy of letter from Mr. McMullen in reference to

Julia E. Hoffman, Executrix, etc.

499

riveters, and wish you would look around a little and see if you can pick up about 20 good men. There should be a few good heaters amongst them.

Truly yours,
HOFFMAN & BATES.

B.

Complainant's Exhibit 24.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, Oregon, May 16, 1893.

Geo. W. Catt, Esq., World Building, New York.

Dear Sir: Yours of the 8th inst. regarding punch and shears at hand. I think it would be well for you to take a look at those tools before they are shipped; that is, if they are made in New York, and see that they are in good working order. However, I don't suppose that the company would send us any machines that would not work.

I cannot yet say what we shall do for rivets, but expect to use bridge men as far as possible. The bridge men here have not had much experience at riveting, still if we don't get any from the east I think we shall get along with what is here.

Yours truly,
LEE HOFFMAN.

[708] [Endorsed]: Filed February 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 25.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, Oregon, June 3, 1893.

J. B. C. Lockwood, Esq., Engineer San Francisco Bridge Company, Seattle, Washington.

Dear Sir: Mr. Foy has arrived and after looking over the situation here has decided that we will require the following quantities of camp and commissary outfit which you have on hand:

- Dishes and cooking outfit for 100 men.
- 2 grind stones with frames complete.
- $\frac{1}{2}$ dozen 8-lb. striking hammers.
- 3 stone hammers.

1½ dozen mattocks.
4 picks.
½ dozen long-handle shovels.
6 dozen short-handle shovels.
1 platform scales.
2 wagons—the best ones.
3 teams of horses with harness.
1 saddle horse.
4 bars of pick steel.
1 dozen tin wall lamps.
09] 2 1-lb. cans of axle grease.
40 lbs. baking powder.
2 dozen axles.
8 horse brushes.
1 dozen curry combs.
1 cleaver.
1 lot of pickhandles.

Please ship the above goods at once, and if you have any good Wheelers or Slush scrapers send them also.

Yours truly,
HOFFMAN & BATES.

[Endorsed]: Filed February 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 26.

McMULLEN v. HOFFMAN.

An adjourned meeting of the water committee was held at the office of Ladd & Tilton in Portland on Wednesday, March 1st, 1893, at 3 P. M.

Present: Chairman Failing and Messrs. Corbett, Dekum, Dolph, Frank Hill, Johnson, Lewis, Loewenberg, Raffety and Richardson—11.

On motion the reading of the minutes of the last meeting was dispensed with.

On motion of Mr. Corbett the bidders were invited to enter the room; about 40 were present.

10] The clerk presented a tin box and stated: "That it contained 31 envelopes endorsed 'proposals,' all of which (except one which came by mail) had been presented by the bidders in person just before 12 o'clock noon this date the limit of time fixed

by the advertisement. As fast as the bids were handed in they were placed in the box and the latter sealed up at noon in the presence of the bidders. At 2:20 P. M. two additional envelopes endorsed 'proposals' were received with the understanding that as they were late the committee would decide whether they should be accepted."

On motion it was voted that these bids should be received.

The box was then opened and all the proposals were read in detail by the chairman.

On motion of Mr. Dolph, seconded by Mr. Corbett, the proposals were all referred to the engineer with instructions to prepare a tabulated statement of them and return all to the committee at 3 P. M. on March 2d.

Adjourned to meet at that time.

[Signed.]

HENRY FAILING, Chairman.

Attést: Frank T. Dodge, Clerk.

Pursuant to adjournment a meeting of the water committee was held at the office of Ladd & Tilton in Portland on Thursday, March 2d, 1893, at 3 P. M.

Present: Chairman Failing, and Messrs. Corbett, Dekum, Dolph, Frank, Hill, Johnson, Lewis, Loewenberg, Raffety; Richardson, and Smith—12.

On motion the reading of the minutes of the last two meetings were dispensed with.

[711] The tabulated statement of all the proposals for the different works for the water supply from Bull Run, which the committee at its last meeting directed the engineer to prepare, was presented and read. The following printed matter is a copy thereof:

Headworks: Lowest bid from John Leavens, \$7930.

Bridges: Lowest bid from Pacific Bridge Co. \$30,000.

Wrought iron plates: Lowest and only bid from Risdon Iron and Locomotive Works, \$354,702.

Manufacture and laying wrought iron pipe: Lowest bid from E. W. Jones and O. W. Wagner, \$477,961.

Steel plates: Lowest bid from Risdon Iron and Locomotive Works, \$340,971.60.

Manufacture and laying of steel pipes: Lowest bid from Hoffman & Bates, \$465,722.

For a wrought iron pipe, including the iron and manufacture the lowest combination of bids would be as follows:

Wrought iron, Risdon Iron Works	\$354,702
Manufacture, etc., E. W. Jones and O. W. Wagner ...	477,961

Total amount of the iron pipe	\$832,663
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For a steel pipe, including the steel plate and the manufacture and laying, the lowest combination of bids would be as follows:

Steel plates, Risdon Iron and Locomotive Works ..	\$340,971.60
Manufacture, etc., Hoffman & Bates	465,722.00

12] Total, steel pipe	\$806,693.60
-----------------------------	--------------

Wolff, Buehner & Zwicker have made the following bid for material and manufacture of a steel pipe, excluding bricks for manholes, etc., included in other bids:

For the steel pipe, metal and manufacture.....	\$804,379.00
Add that price on bricks as stated in bid for manufacture and laying	17,400.00

Total, including bricks,	\$821,770.00
--------------------------------	--------------

Cast-iron conduit, head works to Mount Tabor: The Oregon Iron & Steel Company, \$1,430,738.

Cast-iron conduit from Mount Tabor to City Park: Lowest bid, the Oregon Iron & Steel Company, \$255,310.

Submerged pipes: Lowest bid, the San Francisco Bridge Company, \$97,340.

With a steel conduit from the head works to Mount Tabor and cast-iron pipes from Mt. Tabor to the city park, the total cost of the work included in the specifications, at the prices of the lowest bids, would be:

Head works	\$ 7,930.00
Bridges	30,000.00
Steel conduit.....	806,693.60
Cast-iron pipe to city park.....	255,310.00
Submerged pipes, cast-iron	97,340.00

Total.....	\$1,197,273.60
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[713] As the only proposal for a cast-iron conduit from the head works to Mount Tabor laid complete was \$1,430,738, which was \$624,044.40 more than the lowest proposals for a steel conduit of the same capacity laid complete, it was by vote rejected.

The only proposal for wrought-iron plates for the conduit being \$13,730.40 more than the lowest proposal for steel plates, which the engineer stated he now considered were preferable, it was voted that the conduit from the head works to Mt. Tabor should be constructed of steel plates.

As there had been no proposals submitted for "lapwelded" pipe for the submerged pipes, and as there was some uncertainty as to what was the most desirable pipe for this portion of the line, and there was no immediate necessity for this part of the line, Mr. Frank moved that all the proposals for the submerged pipes be rejected, and that they be readvertised for.

The motion carried.

Mr. Corbett moved, with the second of Mr. Dolph, that contracts be awarded to the following named parties, certified by the engineer as the lowest bidders:

J. M. Leavens, Portland, Or., head works.....	\$ 7,930.00
Pacific Bridge Co., Portland, Or., bridges	30,000.00
Risdon Iron & Locomotive Works, San Francisco, steel plates for conduit head works to Mt. Tabor	340,971.60
Hoffman & Bates, Portland, Or., manufacture and laying ditto	465,722.00
Oregon Iron & Steel Co., Portland, Or., cast-iron conduit from Mt. Tabor to City Park.....	255,310.00
Total	\$1,099,933.60

[714] On motion of Mr. Dolph, seconded by Mr. Frank, it was voted that the engineer be directed to ask the assistance of the city attorney and prepare contracts for these works in accordance with the specifications, proposals and the foregoing awards of the committee, and that the chairman and clerk be authorized to execute said contracts on behalf of the committee as soon as they are prepared and bonds are given with sureties satisfactory to the chairman. It was also voted that the clerk be directed to return to all unsuccessful bidders the certified checks deposited by them.

The following are the proposals, the successful ones being given in detail:

HEAD WORKS.

The contract was awarded J. M. Leavens, of Portland, for everything connected with the construction of the head works, as follows:

Clearing and grubbing, 2 acres, at \$150.....	\$ 300
Trees cut, 100 trees at \$1 each	100
Excavation:	
Earth, 3000 cubic yards at 21 cents	630
Loose rock, 1000 cubic yards at 35 cents.....	350
Solid rock, 7000 cubic yards at 85 cents.....	5,950
Rock under water, 100 cubic yds at \$6.....	600
Total for head works	<u>\$7,930</u>

The other bidders for the same work were as follows:

J. R. O'Neil, Portland	\$ 8,430
Perry Hinckle and Robert Wakefield, Portland.....	9,410
Bays-Jeffery Co., Portland.....	9,709
[715] Paquet & Smith, Portland	11,490
Osker Huber, Spokane.....	11,725
Charles King & Co., Tacoma	11,970
H. W. Holden, Eugene, Or.,	12,300
American Bridge & Contract Co., Portland.....	12,460
N. J. Blagen, Portland	13,200
San Francisco Bridge Co., San Francisco.....	16,550
Hoffman & Bates, Portland	17,800
Carrall-Porter Boiler & Manufacturing Co., Pittsburg...	18,600

BRIDGES.

The contracts for three bridges across Bull Run and the Sandy was awarded the Pacific Bridge Co. of Portland. Their bid in detail was as follows:

One 75-foot span bridge	\$ 1,900
One 160-foot span bridge	7,700
Cylinder piers for same	700
One 300-foot span bridge	18,500
Cylinder piers for same....	1,200
Total for three bridges	<u>\$30,000</u>

The other bidders for the bridges were as follows:

The Bullen Bridge Company, Portland	\$30,821.60
Robert Wakefield Company, Portland	30,845.00
San Francisco Bridge Co., San Francisco.....	31,279.07
Oregon Bridge Company, Portland....	31,993.00
[716] Hoffman & Bates, Portland	33,562.94
E. W. Jones and O. W. Wagner, Portland	35,948.20
Osker Huber, Spokane	37,124.80
Risdon Iron and Locomotive Works, S. F.....	39,458.80

WROUGHT-IRON PLATES.

For Conduit Head Works to Mt. Tabor.

Risdon Iron & Loco. Works, San Francisco.....	\$354,702
(No other bid.)	

STEEL CONDUIT FROM HEAD WORKS TO MT. TABOR.

The contract for furnishing the steel plates for the conduit from the head works to the Mount Tabor reservoir was awarded to the Risdon Iron and Locomotive Works, San Francisco, as follows:

Steel plates, 11,442,000 pounds at 2.98 cents,.....	\$340,971.60
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The other bids for furnishing steel plates were as follows:

San Francisco Bridge Company, S. F.....	\$348,781
Hoffman & Bates, Portland	359,278
Osker Huber, Spokane	366,144
Perry Hinckle and Robert Wakefield, Portland.....	383,307

CONDUIT FROM HEAD WORKS TO MT. TABOR OF STEEL OR WROUGHT IRON MAKING AND LAYING THE PIPE.

[717] Messrs. Hoffman & Bates, of Portland, were awarded the contract for manufacturing and laying the pipe. Their bid in detail was as follows:

Steel, 11,442,000 pounds; rivets, 340,000 pounds 11,-	
782,000 pounds at \$0.0275	\$324,060
Manholes, 225 at \$20	4,500
Air valves, 34 at \$8	432
Bends, extra joints, 200 at \$30	6,000
Blow-offs, with six inch valves, 46 at \$20; waste	
pipes, six-inch, 29,000 pounds at \$0.10.....	3,820
Bricks, laid in cement, 580,000 at \$21.....	12,180

Two stand-pipes.

Steel plates, 15,000 pounds at \$0.08.....	1,200
Water-valves, 36-inch, one at \$500.....	500
Water valves, 33-inch, one at \$500	500
Water valves, 30-inch, two at \$350	700
Waste pipes, 30-inch, 40,000 pounds at \$0.07.....	2,800

Foundations:

Concrete or masonry, 60 cubic yards at \$10.....	600
--	-----

Sleeve joints:

Wrought-iron sleeves, 7000 pounds at \$0.07.....	490
Lead, 3000 pounds at \$0.06	180

Trestles:

Wrought-iron, 40,000 pounds at \$0.064	2,560
--	-------

Foundations:

Concrete, 400 cubic yards at \$8.....	3,200
---------------------------------------	-------

[718] Excavations and refilling:

Earth, 270,000 cubic yards at \$0.30.....	81,000
Loose rock, 10,000 cubic yards at \$1.50	15,000
Solid rock, 2000 cubic yards at \$3.....	6,000

Total, manufacturing and laying\$465,722

The other bids for manufacturing and laying the pipes were as follows:

E. W. Jones and O. W. Wagner, Portland.....	\$477,902
Perry Hinckle and Robert Wakefield, Portland.....	481,040
Wolff, Buehner & Zwicker, Portland, Or.....	495,682
San Francisco Bridge Co., San Francisco, Cal.....	514,664
Osker Huber, Spokane (without brick)	521,775
American Bridge Works & Bullen Bridge Co.....	533,507
Risdon Iron & Loco. Works, San Francisco.....	600,737

PROPOSALS FOR STEEL PLATES AND MANUFACTURING AND LAYING CONDUIT FROM HEAD WORKS TO MT. TABOR ALL IN ONE CONTRACT.

Wolff, Buehner & Zwicker	\$804,379
Add for 580,000 brick	71,400

Total	\$821,779
"Willamet Iron Works"	\$1,299,256

[719] CONDUIT FROM HEAD WORKS TO MT. TABOR OF CAST-IRON.

Oregon Iron & Steel Co., Portland.

Cast-iron pipe, 25,800 tons at \$32\$ 825,600

Hauling & laying 25,800 tons at \$16 412,800

Excavation and Refilling:

Earth 270,000 cu. yds. 0.49\$ 132,300

Loose rock, 10,000 cu. yds. \$0.85 8,500

Solid rock, 5,000 cu. yds. \$2.50 5,000

S and pipes, trestles, brick and specials 46,538

\$1,430,738

(No other bid.)

FROM MT. TABOR TO CITY PARK. CAST-IRON PIPE LINE.

The contract for furnishing the cast-iron pipe, man-holes, valves, etc., for the main from Mount Tabor to the reservoir in the City Park was awarded to the Oregon Iron & Steel Co. of Portland. Their bid in detail was as follows:

Cast-iron pipe delivered in Portland, 6300 tons at \$32..\$201,600

Cast-iron pipe laying ditch, 6300 tons at \$5..... 31,500

Manholes, cast-iron, 30,000 pounds at \$0.05 1,500

Blow-offs, cast-iron, 12,000 pounds at \$0.05 600

[720] Wrought-iron waste-pipe, 13,000 pounds at \$0.07.... 910

Water valves, 10-inch, 5 at \$40 200

Air-valves, 4-inch, 10 at \$10 100

Bends, cast-iron, 20,000 pounds at \$0.05..... 1,000

Excavation and refilling:

Earth, 40,000 cubic yards at \$0.36..... 14,400

Loose rock, 4000 cubic yards at \$0.50 2,000

Solid rock, 1000 cu. yds. at \$1.50 1,500

Total\$255,310

The other bidders for the same work were as follows:

San Francisco Bridge Co., S. F.....\$313,730.00

Osker Huber, Spokane, Wash..... 372,506.50

SUBMERGED PIPES.

The lowest proposal for cast-iron pipes according to the specifications was as follows:

San Francisco Bridge Co., San Francisco, Cal.

Cast-iron pipes, 1,082 tons at \$70	\$75,740
Dredging 30,000 cu. yds. at 30 cents	9,000
Laying pipes 4200 lin. ft. at \$3	12,600

Total	\$97,340
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The other proposals were: *

Jones & Wagner, Portland	\$108,700
Risdon Iron & Loco. Works, S. F.	118,974
Bullen Bridge Co., Portland	133,600
[721] Osker Huber, Spokane	146,794
Willamet Iron Works, Portland	147,811
Oregon Iron & Steel Company, cast-iron pipe, 1,082 tons at \$70	75,740
Bullen Bridge Co.	
For riveted flange joint pipe laid	79,500
For flexible flange joint pipe laid	100,500

As there were no bids for "lap-welded" iron or steel pipe all of the above were rejected.

The "Subcommittee on Construction" made a verbal report concerning the proposed reservoir in the city park and recommended that the engineer be directed to prepare a map of the site and show it to the common council, and apply for the use of the ground needed for the reservoir and the rights of way necessary in constructing and operating it.

On motion it was so voted.

On motion of Mr. Corbett, seconded by Mr. Dolph, Mr. Geo. P. Frank was appointed a member of the "Subcommittee on Construction" to fill the vacancy caused by the death of Mr. W. S. Ladd.

Adjourned.

HENRY FAILING,
Chairman.

Attest: Frank T. Dodge, Clerk.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Julia E. Hoffman, Executrix, etc.

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[722]

Complainant's Exhibit 29.**PACIFIC POSTAL TELEGRAPH-CABLE CO.**

VR. 75. Ra. R. 196 Collect.

Received at 3:15 P. M.

New York, 27th Feb., 1893.

J. McMullen, Hotel Portland, Portland, Oregon.

Errors of one thousand dollars in item forty-seven, also carried into footing bid E. Summer; freight rates will probably be five cents per hundred lower than present here to Chicago, freight rates on plate will undoubtedly be made same as pipe or reduced thirty-seven cents per hundred. Will confirm tomorrow. Hope you can keep price on item twenty-seven up to what we estimated; some of mills may have local representatives Portland which caused them to refuse to bid. It looks like we ought to make some money on plates. Last letter number twenty-seven left here; twenty-second should reach you Tuesday. We have offer from Pittsburgh parties to punch plane scarf and bend for fifty-three hundredths of cent per pound and drive rivets for seven-tenths of cent each. This is equal to seven-tenths of cent per pound for all shop work ready for calking, and includes their profit, our estimate, page one letter nineteen, is entirely safe and very close to cost to put up plant and manufacture pipe. I think it economy to do all work here possible; price on lap welded pipe does not include joints.

GEO. W. CATT.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[723]

Complainant's Exhibit 30.

San Francisco Bridge Company, Engineers and Contractors.
World Building, New York, N. Y. San Francisco and Seattle.

New York, Feb. 21. 1893.

Portland Water Works Letter No. 25, Reference to valves. Bid
"D D D."

J. McMullen, Prest., San Francisco Bridge Co., San Francisco
& Portland.

Dear Sir: The best advice we have reference to items 35 to 37,
inclusive without having the drawings here or knowing just

John McMullen vs.

what is wanted for Portland is that these valves will cost about \$400 each and you should correct bid accordingly. Plus, also the amount of \$25.00 for laying and \$25.00 for freight. We do not recall just how these three items came to be based at \$75.00 each.

Yours truly,

SAN FRANCISCO BRIDGE CO.

By Geo. W. Catt.

[Endorsed]: McMullen vs. Hoffman. Complainants' Ex. 30.
Geo. A. B., Ex. Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[724]

Complainant's Exhibit 31.

San Francisco Bridge Company, Engineers and Contractors,
World Building, New York, N. Y. San Francisco and
Seattle.

New York, Feb. 22nd, 1893.

Portland Water Works Letter No. 26, Reference to price of
manufacturing steel, and consolidated bid.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco
and Portland.

Dear Sir: In case you think favorable of having the steel
manufactured here and ship in a partially manufactured con-
dition I think we ought to estimate on doing the work at .023
c lb. instead of .024 c. lb. This would reduce the price on man-
ufactured pipe \$11,782.00.

I may be able to get a decision from the railroad company as
to just what classification they will give us on partially manu-
factured pipe, and if so will wire you. Of course that would
be on the condition that we get the furnishing of plates as well
as the manufacture.

The bids I sent you I think are safe bids for doing the work,
assuming that we should get award of any one bid. If you put
in bid on basis of taking the entire work, then my idea would
be to make a reduction as follows:

Bid "A," as per estimate sent you. No reduction.

Bid "E," item 47, I would reduce the cost of pipe delivered
on basis of shipping 5000 tons of it around the Horn, to \$40.00
per ton, or reduction of \$18,900. I would reduce item 48 \$2.00

Julia E. Hoffman, Executrix, etc.

[725] per ton, or \$12,600. Leaving items No. 49 to 54, inclusive, as they are.

Bid "G" bridges, items 60 to 64, inclusive, I would bid on material delivered at Portland, freight included at \$4.25; erection same as it is; hauling will probably cost \$.0025; profit .0045; making price per pound in structure .0545 instead of .0575; making reduction of .0003 c. per pound, or about \$1300. Items No. 65 to 68, inclusive, I have no comments.

Bid "D D," item No. 27, I would leave as already sent.

Bid "D D D," item 28, I would reduce to .023, or \$11.-782.00. Items No. 29 to 33½ inclusive, I have no comments. (We call your attention to the fact that item 33½ is brick laid in cement and to correspond with same item of iron conduit. Do not fail to get this in your bid.) Items 34, No comments. Items 35 to 37, inclusive, as per letter No. 25, should be bid at following: Item 35, 36 in. valves, \$500; item 36, 33 in. valves, \$450; item 37 30 in. valves, \$400. This is based on quotation of Coffin Valve Co., to us. It may be that they are figuring on more expensive valve than Portland calls for. Item 38 and 39, No comments; Items 40 and 41, No comments; Items 42 to 46 are only approximate. You may think different about them.

Bid "F," submerged pipe line for consolidated bid, would reduce item 55 possibly 5 cents per yard. Would reduce item 56 cast-iron pipe delivered to \$50.00 per ton, on basis of shipment via Horn. Item 57 I would leave at \$10.00 per foot.

This covers the entire proposition for the Portland Water Works from the best information we have to-day.

[726] I would not bid on iron conduit at all for the reason that you cannot get 7 foot sheets and the cost of manufacturing would be increased over the cost of the steel pipe, and I think we can get better results from steel pipe than from iron; everything considered.

I do not know exactly what Lukens people can do, but they are the oldest firm in the United States in the making of boiler plate. Surely Carnegie Steel Co., in their material showed magnificent results in what they delivered to East Jersey Water Works Co.

We are sorry that the information sent you has dribbled

This much only offered.

along so and that we have had to write so many pages of letters, but it came in to us in such shape that it seemed advisable to do it. We are now at a little loss to know whether these letters will reach you before the letting, but the best time we can figure on it you should get them Tuesday morning at Portland, on the 7:45 train, provided they do not get delayed between here and Portland.

Yours truly,
SAN FRANCISCO BRIDGE CO.

By Geo. W. Catt.

This makes consolidated bid about \$1,240,000.00. \$40 for item 47 may be more reduction than necessary to knock out Portland on Bid E.

In consolidated bid it may be best not to insist on including Bid F.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[727]

Complainant's Exhibit 39.

WESTERN UNION TELEGRAPH CO.

McMullen v. Hoffman.	Compl. Ex. 32.	G. A. B., Ex.
E Mc	87 Collect	10.27 A
	3-1	1893

Dated "Md" San Fran., Cal. 1

To J. McMullen, Hotel Portland.

Part in brackets only offered.

Catt's final estimate bid A, eight thousand seven hundred, seems too low; furnishing steel at three and two six-thousandths cents seems about right [making and laying three and five four five thousandths cents on net plate weight seems high on shop work and plant by a quarter cent.]— Submerged pipe compared to McNeal twenty thousand too high principally in cost of iron Bridges too low by quarter cent to include lumber piles and incidentals. Pomona man failed to connect yet. Wire chances this P. M.

H. S. WOOD.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 33 (Geo. A. B. Ex.)

[728] San Francisco Bridge Company, Engineers and Contractors,
World Building, New York, N. Y. San Francisco and
Seattle.

New York, February 21st, 1893.

Portland Water Works Letter No. 15, Reference to cost of
manufacturing pipe.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco
and Portland.

Dear Sir: Referring to letter No. 5 where I have made out in
detail somewhat the shop cost of manufacturing pipe ready for
calking, I wish to supplement that, in view of the fact that
I have some later information in reference to material and also
some better information in reference to tools. 60 men will run
all the tools, including unloading, and running the three rivet-
ers night and day, for the manufacture of 50,000 pounds of
pipe per day. This would make my estimate of labor per day
less than in my former estimate. Also I have a price on rivets,
so they would only cost us $4\frac{1}{2}$ cents per pound delivered in
Portland, which would make the average cost of rivets for 50,-
000 pounds of pipe \$70 instead of \$100. In other words I
would have reduced my cost price by about .0005 cent per
pound. No great amount, to be sure, but I am satisfied that es-
timate I sent you of .006 cent for shop work, including the riv-
eting, up to the time of calking is to be done, is ample with the
proper equipped plant.

Yours truly,
SAN FRANCISCO BRIDGE CO.
By Geo. W. Catt.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

729]

Complainant's Exhibit 34.

San Francisco Bridge Company, Engineers and Contractors,
World Building, New York, N. Y. San Francisco and Seattle.

Portland Water Works Letter No. 16, Reference to 7 foot sheets as against 5 foot sheets.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco and Portland.

Dear Sir: If we get steel sheets 7 foot in width in preference to 5 foot sheets there will be a saving of 86,460 rivets and the driving of them, also the time saved in making 7,200 connections. So you see the manufacturing of 7 foot sheets are much preferable.

The above also saves the punching of 172,920 holes, and the swedging of 14,400 corners.

Yours truly,

SAN FRANCISCO BRIDGE CO.

By Geo. W. Catt.

[Endorsed]: Filed Feb 29, 1896. J. A. Sladen, Clerk.

McMullen v. Hoffman. Complainants' Ex. 34. G. A. B., Ex.

Complainant's Exhibit 35.

McMullen vs. Hoffman. Complts. Ex. 35. G. A. B., Ex.

730] San Francisco Bridge Company, Engineers and Contractors
World Building New York, N. Y. San Francisco and Seattle.

New York, Feb. 21st, 1893.

Portland Water Works Letter No. 17, Reference to Lukens & Co.'s price on steel plates, and Fuller Bros. & Co.'s price on rivets.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco & Portland.

Dear Sir: Up to the present hour the bid of Lukens & Co. on steel plates is the best we have received, which Hoffman already has, that is, \$1.85 per hundred pounds. This bid is based on narrow plates. They advise us that they would make plates 7 feet in width for additional of 50 cents per ton, or \$1.87½c per hundred pounds.

Julia E. Hoffman, Executrix, etc.

515

This only offered.

[We enclose herewith copy of letter from Fuller Bros. & Co., 139 Greenwich St., New York, reference to steel rivets, which is the best price we have up to date.]

Yours truly,

SAN FRANCISCO BRIDGE CO.,

By Geo. W. Catt.

Enclosure:

Copy of bid of Fuller Bros. & Co.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 36.

McMullen v. Hoffman, Compls. Ex. 36. G. A. B., Ex.

San Francisco Bridge Company, Engineers and Contractors.

[731] World Building, New York, N. Y., San Francisco and Seattle.

New York, Feb. 21st, 1893.

Portland Water Works Letter No. 19, Revised estimate of shop cost.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco & Portland.

Dear Sir: Total men to operate tools, to deliver the pipe for calking, 60 men, at an average of \$2.50 per day \$150.00
 Coal and oil 25.00
 Rivets for 50,000 pounds of plates; excess of cost of rivets over price paid for the finished pipe 60.00
 Engineer and fireman ... 15.00
 Shop superintendents and supplies 50.00

Making a total per day of \$300.00

Assuming that we turn out 50,000 pounds per day, we have the shop cost of pipe ready for calking.

as per previous letter006
 Calking estimated at0005
 Dipping and Testing estimated at0015
 Contribution towards cost of above plant003
 Superintendence and Incidentals0015

Making a total of0125

Summary will be as follows:

Riveting in field (rivets included in shop cost) . . . . .	.002
Hauling . . . . .	.0025
732] Shop as above . . . . .	.0125
Profit . . . . .	.007

Or bid for pipe in the ditch024

This is best I can give to-day.

Yours truly,

SAN FRANCISCO BRIDGE CO.,

By Geo. W. Catt.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 37.

McMullen v. Hoffman, Compl't. Ex. 37. G. A. B., Ex.
San Francisco Bridge Company, Engineers and Contractors,
World Building, New York, N. Y. San Francisco and Seattle.

New York, Feb. 21st, 1893.

Portland Water Works Letter No. 23. Reference to tools.
J. McMullen, Prest., San Francisco Bridge Co., San Francisco
and Portland.

Dear Sir: Best I have reference to tools up to the present date is on basis of patronizing Hills & Jones reference to punches, planers and rolls; Bement, Miles & Co., for riveters, on basis of furnishing one set of tools. complete, for one side of the shop in 60 days, for shipment from here.

733] Enclosed I hand you photograph of Bement, Miles & Co.'s tools. You already have Hills & Jones' catalogue.

Also enclose blue print showing general arrangement of one riveter.

Yours truly,

SAN FRANCISCO BRIDGE CO.,

By Geo. W. Catt.

Dictated.

Enclosed to Portland: Photograph and blue print of machines.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 38.

McMullen v. Hoffman, Compts. Ex. 38, p. 1. G. A. B., Ex.
 San Francisco Bridge Company, Engineers and Contractors.
 World Building, New York, N. Y. San Francisco and Seattle.

New York, Feb. 22nd, 1893.

Portland Water Works Letter No. 27, and last before letting.
 Reference to speed of tools.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco and Portland.

[734] Dear Sir: In figuring speed at which work can be turned out, the actual time actually occupied by the tool is inconsiderable. Take the punches, for instance, after the plate is set there is no trouble to get 12 to 15 strokes per minute. In rivets, there is no trouble to rivet 7 to 10 rivets per minute after the material is in place once. The time is occupied at the punches, for instance, in getting the plate on the table, fastened in, loosened, turning it over, and fastened again for the other side, then loosened, and getting it on the crane ready for the next punch or planer, as the case may be.

We are now figuring on using punches of the Hills & Jones type. Punches for punching the transverse single row of holes, we contemplate using No. 5, on page 16 of their catalogue, 15 in. throat machine. This punch so arranged and constructed as to carry 6 punches, and die holders for the same. Punch to be without engine, and arranged to run with right angle gear from main driving shaft; the radial double row of holes we are contemplating doing with No. 6 on page 14 of their catalogue, 16 in. throat machine. Punch constructed and arranged to carry 10 punches, die holders, etc. for the same.

Portland Water Works Letter No. 27, page 2.

Auxiliary punch and shear we are contemplating using No. 3 machine, on page 21 of their catalogue, 30 in. throat, to use for doing the odd work, such as punching manholes, etc., the odd shape sheets for making bends, etc. This punch also arranged as a shear.

Spacing tables to be furnished for these as per cut on page 149.

Planers, as per page 147, size No. 2, 16 feet.

[735] Rolls as per page 127 of catalogue, size No. 3, 8 feet, 2 in. between housings.

John McMullen vs.

The riveting plant, we are not fully decided yet, as we have not as yet final proposition from Morgan people or Sellers & Co. We only have definite proposition from Bement, Miles & Co.

Yours truly,
SAN FRANCISCO BRIDGE CO.,

By Geo. W. Catt.

Cold as Hell? here. No prospect of starting Boston now for 10 days anyway.

McMullen v. Hoffman, Complts. Ex. 38, p. 2. G. A. B. Ex.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "A".

McMullen v. Hoffman. Deft. Ex. A. G. A. B., Ex.
San Francisco Bridge Company. Railroad & General Contractors, Dredging & Excavation. Offices, 42 Market St., San Francisco, Cal. Occidental Block, Seattle, Wash.

San Francisco, Cal. December 31st, 1892.

Mr. Lee Hoffman, No. 53 Worcester Block, Portland, Oregon.

Dear Sir: The Risdon Iron and Locomotive Works sent for [36] me yesterday, and told me that if I had any pull, or had any friend in Portland who had a pull, to get in and use it with the Portland Water commission, as the Oregon Iron and Steel Company were trying to get the commissioners to adopt cast iron pipe for the Bull Run pipe line, claiming that they have a mine in Mexico from which they get very superior ore and that they could make cast iron pipe that would stand a tensile strain of 24,000 lbs. to the square inch; while the best pipe makers in the east claim 16,000 or 17,000 pounds to the square inch is the most that cast iron will stand.

If the Oregon Iron and Steel Company can prevail on the commission to adopt cast iron, it would virtually create a monopoly for them, as they are the only ones there who make cast iron pipe, and the Risdon people tell me that they can make it there in Oregon cheaper than one can import it from the east.

As you are acquainted with all the Water Commissioners, and have social and business relations with many of them, I think you are in position to counteract this movement, and if

Julia E. Hoffman, Executrix, etc.

we are to make anything ultimately out of this job it will be necessary to knock out this scheme. Get in and do what you can to beat it.

I understand the Oregon Iron and Steel Company have a big pull in the commission. What you do, must be done at once, as I understand they are to determine the matter at a meeting to be held next Tuesday.

Drop me a line and let me know how matters stand there on this question.

[737] I was sorry to hear that you sustained quite a heavy loss during the recent bad storms. We, too, met with quite a loss in the Folsom bridge; it was carried out about five days before it would have been off the falsework; will probably cost us 7 or 8 thousand dollars to get it back.

How are things generally with you?

Yours truly,

J. McMULLEN.

Received 1-2-93.

Answered 1-2-93, by L. H.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "B."

McMullen v. Hoffman. Deft. Ex. B. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., Jany. 26th, 1893.

Mr. Lee Hoffman, Room 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of January 23rd at hand and noted.

[738] I have a clipping from the "Oregonian" of the 21st inst., which sets forth the intention of the water committee substantially the same as indicated in your letter, namely, cast-iron pipe from Mt. Tabor to the city, the rest wrought iron pipe, and that they are going to receive bids on cast-iron pipe for the rest of the way also. We suppose that asking for bids for cast-iron pipe all of the way was a kind of a concession to the O. I. & S. Co. I understand from this clipping that separate bids for the wrought iron for the pipe will be taken.

From correspondence that I have seen between the Risdon and Wolff & Zweicker, I am satisfied that they are pretty intimate, and that they will pull together in some form. Now, I

do not think that they will take us in, unless we convince them that we are going to make a hard bid for the work. Do not let them know that you do not want the job! I do not think that the Risdon want so many partners in the contract. They might take Wolff & Zweicker in, but I do not think that they would want to take you and us in. I think that we would do better by making them buy us off. The Risdon is a large and wealthy 4-handed concern, and they will make a hard fight for this job. I think that we bid so hard on the job before, that if they think we are going after it on the same lines again, that they will be disposed to capitulate with us. I think you ought to make Wolff & Zweicker understand that you and I are together, and that we are going to hit the job hard; then if they make satisfactory inducements when the time comes we will quit. I am pretty close to the Risdon. Have been in several deals with them. We were in with them on the contract for furnishing the dredger and doing the dredging at Honolulu—about \$15,000,000 worth of work; they took me in because they could not very well get along without me; we had a half interest in the deal. If they think they can throw you and me overboard they will do it in a minute, so I do not think we ought to talk partnership at all; on the contrary, talk "get the job," then if they are afraid of us they will buy us off. Of course, there may be so many bidding on it that it would not be worth while buying off one unless they were going to buy them all off, but this will develop later.

Perhaps the O. I. & S. Company could be gotten out of the way by giving them the cast-iron work, as I do not think the Risdon could compete with them on that portion of the work; yet the O. I. & S. Company might get a better price for that portion of the work if the Risdon and us should agree to let them alone on it, on the condition that they let the wrought iron part of it alone.

How much money will the committee have to spend?

When do you now expect to be in the city?

Send me copy of the specifications, and full information, as soon as the same is out.

We will have to get some one to do some rustling for us in the east for material, plant, etc., etc. Perhaps Mr. Catt can get time to do this.

Is the Wolf & Zwicker concern a strong outfit financially?

Julia E. Hoffman, Executrix, etc.

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We might be able to get a portion of the work instead of a pool—the submerged pipe, and the bridges, or a subcontract for laying the pipe.

I think that we can arrange it in some way so that we can make some money out of it.

I assure you that there is absolutely nothing offering in the bridge business in California. The bridges that went out in this state did not amount to a "hill of beans"—small, cheap, wooden structures; I do not know of a job that has been let to be re-placed; neither do I know of one advertised.

Mr. John Dyer, one of Risdon's men, is now in Portland looking after this job. Meet him and let him know that you are after the job.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "C."

McMullen v. Hoffman. Deft. Ex. C. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., Feb'y 6th, 1893

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Please send us strain sheets and blue prints of the plans of the bridges, including profile; also blue prints of the ball joints, and any other plans for the pipe line that they may have.

I have sent three copies of the specifications to Mr. Catt, and instructed him to get cost of plant for manufacturing pipe, and also the cost of manufacturing pipe, together with the cost of lap welded pipe for the submerged portion; also cost of ball joints.

I will probably be up there about the 25th of the month, at which time I will have a report from Mr. Catt on these things.

[741] I also have the old estimate, very full and complete, that we made five or six years ago—when the work was offered before.

As I said before, I think the important thing is to make Wolff & Zwicker think that we are going to hit the job hard; then they will tell the Risdon, then we will see what we can do when we get there.

You said that they would not have steel. Specifications provides for bids on steel as well as on iron. How is this?

Also please send to Mr. Catt, room 183, World Building, New York City, copies of all the blue prints mentioned, or that they may have illustrating the work.

Yours truly,
J. McMULLEN.

Received 2-8-93.

Answered 2-8-93.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "D."

McMullen v. Hoffman, Deft. Ex. D. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., Feb'y 8th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

742] Dear Sir: We have schemed and figured a great deal the last three or four days on the Bull Run pipe line, and we are getting enamored of the job, and I think the way to make some money on that proposition is to do the work. There is nothing in furnishing the iron, as undoubtedly the iron men will bid direct, as per specifications, and I suppose we will have to give the Oregon Iron & Steel Co. the cast-iron.

We understand it is settled that the cast-iron pipe will be built from Mt. Tabor to the city reservoir—5½ miles—and that the other 24 miles, from the head gate to Tabor, will be of wrought-iron pipe—write me if this is correct—although they take bids on cast-iron, too, for that latter. I figured it up roughly, and I think that cast-iron pipe on this latter would cost about \$400,000.00 more than wrought iron, and that on the other piece from Mt. Tabor to the city reservoir in cast-iron will cost about \$100,000.00 more than it would if they did it in wrought iron, and as it is no better I think this is quite a gift that the water committee will be making to the Oregon Iron & Steel Company.

We will have to make the Oregon Iron & Steel Company know, when the time comes, that if they do not quit, and let go on everything except the cast-iron, that we will hit them hard on the cast-iron and make it rocky for them, as I understand from interview with eastern cast-iron pipe men, who have agents here, that they can put that cast-iron down in Portland cheaper than Portland men can make it, and bet-

[743] ter too. I shall have some figures from the McNeal Pipe Foundry, one of the largest pipe manufactures in America; their representative was in the other day. I have made very full inquiries in the east, and Mr. Catt is going to devote his entire time next week to getting prices on cast and wrought iron pipe and the cost of plant and equipment for doing the work, and other matters relative to the job.

I want you to make very full and thorough investigation, too, and then we will compare notes.

I do not think it will take much money to run that job; think perhaps the plant, including building, is worth somewhere from \$25,000.00 to \$40,000.00, but this is practically all the investment that we would need to have, as they are to pay 90 per cent every month, and that ought to pay all bills; only thing would be to see that the estimates were kept full. which I do not think would be any trouble in doing with old man Smith. I think you ought to ascertain (off hand, and without apparently caring to know) just what the Oregon Iron & Steel Company do want in the job, and whether they will be satisfied with the cast-iron or not, and how far you think the committee will go to favor them. If the wrong man should be the low bidder, do you think they would readvertise the job over again to knock him out? I expect you to know all about this very important part of the business when I get up there.

Yours truly,

J. McMULLEN.

Received 2-10-93.

Answered 2-11-93.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[744]

Defendant's Exhibit "E."

McMullen v. Hoffman. Deft. Ex. E. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., Feb'y 13th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of Feb'y 11th at hand and noted.

From your letter I understand that you expect that the Oregon Iron & Steel Company will only bid on cast iron from Mt. Tabor to the head-gate. Is this correct? That is, they do not intend to bid on wrought iron pipe. Now, if this is correct,

they cannot possibly get down to the wrought iron price, and consequently will not be in the business for this portion of the work.

The cast iron can be put down from the east, by sailing vessel freight, for about \$30.00 per ton. I do not think the Oregon Iron & Steel Company can make it with any profit at this price.

Mr. B. A. Knight, Agent McNeal Pipe & Foundry Company here, tells me that he thinks that the specifications have been written in the interest of the Oregon Iron & Steel Company in designating unusual and different sizes from what the pipe foundry men in the east make. Many years since the pipe foundries got together and organized a standard, and everybody conformed their product to that standard of sizes, and he seems to think that these specifications have deviated from those sizes to make it necessary to put in a different plant and fixtures to do this job, which he says no pipe foundry would do.

[5] We quote the following from a memo. which he sent me on this subject: "Are the sizes given for cast-iron pipe 32 in., 33 in., 35 in. and 42 in. correct, and if so does it mean internal or external diam. In either case they have chosen sizes that no foundry in the country have ever made; they have no fixtures for such odd sizes, the standard of all foundries run 30 in., 36 in. and 40 in. or 48 in. No foundry can make these odd sizes pipe without going to a great expense in preparing for it, which would necessarily add to cost of pipe, while several of the largest foundries are already prepared to make 30 in., 36 in., 40 in. and 48 in., internal diam. As there are several errors in the spec., the printing of these sizes may be another; for instance, cast-iron pipe E. it says "12 inch length" instead of 12 ft. They ask for 24 in. ball and socket joint pipe in 13 ft. lengths—this should be 12 ft, lengths same as other sizes. There is not a foundry in the country that can deliver at Portland any quantity of pipe called for of these sizes in 80 days after receiving contract."

I wish you would call Col. Smith's attention to these sizes not conforming to the eastern pipe foundries standards, and also ascertain whether it means inside or outside diameters, and draw him out, and then write me and let me know if you think he has willfully made the specifications to accommodate the Oregon Iron & Steel Company. Do not mention the Mc-

[746] Neal Pipe Foundry to him, as Mr. Wright particularly requested me not to implicate him in the inquiry, as he expects to be there when the letting comes up. He says he has twice bid on different lots of cast-iron pipe for the water committee and each time was the lowest bidder and that the bids were all thrown out, and that it was brought in open market from the Oregon Iron & Steel Company at a higher figure; he thinks that the committee are thoroughly in harmony with the O. I. & S. Co. so far as the cast-iron pipe is concerned, and that they do not want any competition on that part of it. What do you think? Write me on this matter as soon as you have made this investigation, as I have promised Mr. Knight that I would find out how the engineer and committee stood on this question, and whether the odd diameters were made intentionally and for that purpose, and whether it is inside or outside dimension.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "F."

McMullen v. Hoffman. Defts. Ex. F. G. A. B. 22x.

San Francisco Bridge Company.

San Francisco, Cal., March 8th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

[747] Dear Sir: Got home all right, and this afternoon have had an interview with Bob and the Captain, but can settle nothing with them yet as their eastern man has not arrived as yet; they expect him about Sunday; they told me that he had given them a price prepaid to Portland, also a price at the mill, and that if they could save anything on his price delivered on the freight they might accept his mill price, and make their own arrangement for freight. They have had a talk with the Union Pacific people to see what they could do, but as yet they cannot say anything about the routing of it. I told them that it would be some advantage to us to be able to control the delivery of the plates, so that they would arrive just when we wanted them, and not too many at a time, etc., etc., and with this in view we were prepared to make them an offer to assign their contract.

The Captain did not act as if he was unfavorable to this kind of a proposition; said he would have to wait until his man got here—when I am to see them again; he promised me that he would give the Union Pacific the preference. I told him that if they handled it, it could be sidetracked at Fairview without additional cost, and that that was another reason why we wanted to get control of the proposition. I know that they will do all that they can to oblige us, but whether they will sell out to us at a price that would be satisfactory. I am doubtful. I would not be in favor of giving them over \$15,000 anyway, but when we get down to that point I will advise you by wire as to what the situation is.

748] I wish you would send me a blue print profile and plan of pipe line location, as I have none here. Also wish you would get me a regular railroad profile of the route of the pipe line. The Colonel must have these; I would like to have a copy; you should have one there, too, in the office.

After a conference with our Mr. Wood, I am satisfied that all our estimates on the plant to build the pipe were excessive.

I think we can put a plant there to do that work at a cost not to exceed \$35,000.00. However, if you consummate the deal with Wolff, we will not need to scheme on this point further. Yet I would not make another dollar concession to him. I think we are paying a liberal price, and that he can make a lot of money out of it, and I think you ought to close it with him without waiting to find out how the iron will be routed. If we can send it over the Union Pacific, we will do so; if we cannot, he will have to manage it otherwise; in any case it does not amount to over \$5,000.00 or \$6,000.00.

I wish you would see your friends on the committee, and see if you cannot get them to reconsider the submerged pipe proposition, as I believe that we have at least \$20,000.00 in that. If it is advertised again, it might be possible that we would get left; if we should, however, at the first bidding, do you not think we could get it readvertised again—so as to give us another chance at it? I think you have pull enough with the committee to do this. If you cannot get it awarded on the present bids, I am in favor of looking after it very closely when it does come up again, and be in touch with every one who makes inquiries about it relative to bidding, and taking them in, and getting a good price for it. If we can do this I believe

[749] it can be gotten the next time with more money in it than there is now—for the reason that the wrought iron pipe will be cheaper than the cast iron pipe. I hope you will keep a close watch on this, and advise me promptly, and if any Eastern men should go after it the second time, we can have Mr. Catt look after them and take them in, and you can look after any one up there, and I can look after any one down here. The Risdon would probably have to get a little something out of it.

Another thing I wish you would do is, ascertain what the bid of the Oregon Iron & Steel Company was for laying—which was erased in their bid; the clerk, or the Colonel can tell you this: you will remember that in reading the bid Mr. Failing remarked that the bid for laying was scratched out. I would like to know what it was.

Did the Pacific get the bridges?

Advise me how things are going on there.

Mr. Wood sends you by this mail a synopsis of bid from the Southern California Pipe Company for manufacturing and laying this pipe. They were going to do it with a \$7,500.00 plant, and by hand, and Mr. Wood tells me that without figuring the cost of the plant, and without figuring the cost of the asphalt, their bid is 1 4-10 cents for manufacturing, or just what we propose to give Wolff. I suppose the asphalt and the plant would probably amount to about \$8,000.00 or \$9,000.00. I have considerable respect for these parties' figures and calculations, because they are practical men and have built many miles of pipe.

Yours truly,

J. McMULLEN.

[750] [Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "C."

McMullen vs. Hoffman, Deft. Ex. G. G. A. B., Ex.

San Francisco Bridge Company,

San Francisco, Cal., March 14th, 1893.

Mr. Lee Hoffman, Portland, Oregon.

Dear Sir: I just came from the Risdon. Met Wolff there, also J. W. Hoffman, of J. W. Hoffman & Co. of Philadelphia—the party furnishing the plates to the Risdon. I inclose you his card. They are just closing the contract with him. The routing of the stuff has not been determined on as yet. In fact,

from what I heard them, say, I think they are going to stand the railroads off one against the other, and make them pack it for the lowest living rate possible. I told them that you would prefer to have it come over the Union Pacific, if possible. Wolff says he does not care much.

Wolff has closed with the Risdon for a plant to do the work, punches and riveters and accumulator and the use of the calking tool.

I think Zwicker returns to Portland to-night.

Wolff said he might possibly go east.

Wolff says he will be delivering us pipe by the 15th of June. I doubt this, however.

[51] I told Wolff that I thought that he had a good contract; that he would pay for his plant, and make \$25,000.00 besides. He said that he thought he had a good contract and that he would do well; said he thought that we, too, had an excellent contract.

Now, Lee, that we have gotten rid of furnishing the plant, and rid of the organization and administration of a pipe shop, and got it reduced to a plain proposition of digging the ditch and laying and riveting the pipe, it will not require much money now to handle the job, perhaps you would like to buy me out, as the conditions that originally led us to go in together, namely, the large investment and administration involved, are now overcome, and you could handle this thing just as well without me as with me. You readily understand that it is a much simpler proposition now than it was when we first agreed to go together. Of course, I only make this as a suggestion. If you do not think favorably of it, and prefer to let it remain just as it is, we are agreeable, and will try and contribute our share to make the venture a success—which I feel sure it will be.

Neither do I want you to think that we are doubtful about its being a profitable job; on the contrary, every way that we are able to look at it, or figure it, we cannot see how we can help but pretty near work to our estimate. I believe our estimate is as near right as it is possible to make it. In fact, it is a concurrence of three or four estimates: Mr. Catt's, our own, your own, and Wolff's. We cannot all be wrong. While it is possible that the pipe may cost ten, fifteen, or even twenty thousand dollars more to lay and rivet it in the ditch than we

[752] have estimated, I think this would be the extent of any excess or overrunning of the estimate, and I think by close and judicious management of the other parts of the work, the excavation, and the specials, and advantage of changes that may be required will more than make up what the making and laying of the pipe may overrun the estimate. In other words, I have faith in working to our figures.

If you buy me out, it will include my interest in the subsequent work, and I will do my best to get you the submerged pipe.

The only thing that would induce me to sell out to you is that we are short of money, owing to the large investments that we have recently made in the east. My price is \$25,000.00; half cash, balance in negotiable papers—6, 12, and 18 months. Let me hear from you on this subject.

From the talk I had with the Risdon, I feel sure that we will not be able to buy them out; they think that they have given the bond, and that they will be responsible to the water committee any way, and that they will be responsible for the pay for the iron; and then they have a little pride in it, I think, and would not want to be known selling out. I am satisfied that we cannot do anything with them that would be satisfactory to us.

Yours truly,

J. McMullen.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "H."

[753] McMullen vs. Hoffman. Deft. Ex. H. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., March 20th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: I have read over carefully the contracts that you sent me, and I wish to mention a few things that occurs to my mind:

Firstly: Relative to the bends. It seems to me that the economical way to construct these will be to determine from survey in the field the actual degree of curvature required at each bend, then make all these bends in the shop, and only have one joint to make in the field. I do not see why this cannot be done, and why it is not the most economical way to do

it. I shall see Moore of the Risdon and get his advice about this. I understood Dyer to say that they always made them in the field. Dyer also told me that Schussler never permitted but one strap or bend to be put in a place; that where they required more than one he always had a section of pipe, at least 5 feet long, or one sheet intervening between the short strap or bend. I am sure it will be much cheaper to have all these bends, if possible, made in the shop, and I do not see why they cannot all be made in the shop, as it is no trick to get with an instrument the actual degree of curvature required at each locality. If we have them made in the shop we might get them [754] in with Wolff's contract without extra compensation to him. Don't you think so?

Page 12, paragraph 81, says that "bends must be connected with adjacent pipes by collars and rods, and braced to the outside with dry masonry or concrete whenever it may be ordered by the engineer of the water committee. What is the Colonel's idea about these collars and rods, and about when they will be necessary?

Wolff told me that he intended to use iron rivets. The specifications call for steel rivets. I suppose the Colonel has been conferred with, and agrees to iron rivets.

Also on page 8, article 61, provides "that the rivet holes must be punched from the side of the plate which is to be placed in contact with another." I understand that the Risdon's plan does not punch this way. I suppose, however, that Wolff has arranged for plant that will do this, or has arranged with the Colonel that it is not necessary to be done this way. However, I thought I would mention it to you.

I have just heard that Kelso has taken a big sub-contract from McMertrie & Stone on the Southern Pacific work, near Santa Margarita—a year's work, two or three hundred thousand dollars' worth, and has just gone north to get his stock to put on this work. I am sure that he will try to get Foy for this work. Last summer, when we had nothing for Foy to do, we loaned him to Kelso, or at least told him that he might take a job with Kelso if he wanted to until we needed him. Now, if we want him on the pipe line, I want to telegraph Lockwood [755] to this effect at once, as he might not think we had anything for him to do, and might make an arrangement with Kelso. If you have not written me already about this, please tele-

Julia E. Hoffman, Executrix, etc.

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graph me on receipt of this letter if you want him, and I will communicate with Lockwood. There is just one thing about Foy—when he is on a job you do not need to be on it yourself; at least, he comes nearer being this kind of a man than any man that we have ever had.

Yours truly,

J. McMULLEN.

P. S.—There is nothing in the specifications that says whether the pipe is to be weighed before it is dipped or after, and it will make a difference of several thousand dollars. If the Colonel will stand it you ought to arrange to weigh it after it is dipped. Perhaps you and Wolff can get him to agree to this, as Wolff is interested in it as much if not more than we are.

Received March 23, 1893.

Answered March 23, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "I."

McMullen vs. Hoffman. Deft. Ex. I. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., March 18th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of the 16th at hand and noted.

[756] I note what you say about not buying me out. This is entirely satisfactory to me, and I agree with you that the contract is all right; that I will make more money out of it by not selling out.

I think Wolff is going home to-night; have seen him nearly every day since he has been in town. They have closed with the Risdon for an outfit for building the pipe; trade also includes the pneumatic caulking tool. Bob Moore told me that the entire deal was about \$28,000.00. I do not know exactly what it includes, but understand it has 8 riveters, 2 punches, and that they are going to build the rolls in Portland—or use some that they have.

I had lunch with the Captain and Moore yesterday, and the Captain says that the iron will be there on time, according to their contract with the water committee, namely, sixty days from the signing of the contract, which was the 8th of March;

this would make the first consignment due there the 8th of May.

Wolff hopes to be ready to commence work about that time, though I apprehend that he will not get any pipe to lay before the 1st of June. I think we should be ready by that time to lay the pipe.

We have schemed several times on machinery to dig a small ditch, and have always come to the conclusion that it would not pay to attempt to get anything up for this purpose. The principal reason is this, Lee, that the section of ditch is too small, that it would involve too much moving of the machine—so much that excavation by machinery would not be economical. I am entirely satisfied on this point. You see, we have about 24 miles to go to get less than 300,000 yards. In other [757] words, it only amounts to about 11,000 yards to the mile. Well, now, take 11,000—say it costs us 15 cents a yard to throw it out by hand, that is, only \$1,650.00 a mile. Now, I do not think you could build a machine that you could move over the ground and do the work for this price. The whole amount to be dug is so small that it would not justify investment in a machine. For instance, the whole amount at 11,000 yards to the mile, and say 15 cents per yard, only amounts to about \$38,000.00. Now, I do not apprehend that you could get up anything of a machine at all for less than from \$5,000.00 to \$8,000.00. Then, again, there is so much uphill and downhill to it; liable to encounter loose boulders and stone, which would be fatal to the successful operation of a machine. Now, I am quite satisfied that the old way of plowing and throwing it out by hand is the cheapest way to do this work.

We have considered this same proposition many times before, and have always come to the same conclusion, even where the conditions were more favorable to machine work than they are on this job.

With regard to sub-letting this part of the work, I am not decided whether it is to our interest so to do or not, and am doubtful about the propriety of doing so for the following reasons:

1st. It is so hard to get a sub-contractor who amounts to anything.

2nd. It would be so hard to get a sub-contractor to do the work at the time, and in the manner that would serve our interests.

758] 3rd. We have got to have camps, commissary and administration all along the line for the putting into the ditch and riveting of the pipe, and I do not think that this commissary or administration would cost us hardly any more to superintend the excavation and refilling at the same time, and then we would have the advantage of having it done exactly as we want it, and our commissaries would be more profitable, because we would have a larger number of men to board, while the administration of it would not amount to much more; for instance, we have got to have timekeepers and superintendents, etc., etc., and they can just as well administer the whole work, and the riveting of the pipe would not have to stand all this cost of administration; it would be shared by the excavation.

The plant, outside of some stock to do some of the excavation, does not amount to anything; should not suppose it would amount to more than \$1,000.00 or \$1,500.00 on the whole job. We need some good stock to plow with; perhaps—for a guess—from 10 to 16 head; possibly less. Kelso has a lot of fine stock, and I did not know but we might make some arrangement to hire them from him cheaply for a couple of seasons, as I do not think he has anything for his stock to do.

We, too, have 7 or 8 head of horses and mules at Seattle that we had on the Great Northern, that we could turn in on the work—if you were agreeable. Besides, we have quite an outfit of plows, wagons and scrapers, and other excavating plant, together with a lot of camp fixtures, blacksmith outfits, drill steel—all of which are exactly adapted to the work, and we 759] would put it all in at a price that will be entirely satisfactory to you, and it will not cost much to ship it over from Seattle.

I have another letter from Mr. Catt, and he is satisfied that there is money in the rock and earth work.

I have submitted you my ideas candidly on this subject of excavation, and I am satisfied that it will be to our interest to keep the thing right in our own hands.

Since writing the above, Mr. Wolff and his son came in, and I told him that I was writing you relative to sub-letting the

excavation, and he volunteered to say that he thought we would make a mistake so to do; says that we ought to have control of this even if we do not make a cent out of it.

I got your wire about having the 35 in. iron come first. This is all O. K. and has been fixed.

I think we ought to begin to get our organization together and start to dig the ditch about the 1st of May. If we do the excavation ourselves, I think this is a big enough job to have a superintendent of Foy's calibre, and I think you would be satisfied with his management. I think we need a general superintendent to have charge of the whole business—to see that the pipe is properly delivered, and to superintend the excavation and refilling, and to look after the camps and boarding-houses, and be at the head of the gangs who are riveting and connecting the pipe. Mr. Foy is a rustler, and he will stand no nonsense, and he has a faculty of getting along with men, and he knows a good man when he finds one, and he has a pretty good following of men, too. However, if you have a superintendent or somebody whom you would rather have, I am satisfied.

[760] I have had some talk with Risdon relative to fitting us out with tools for field use, and I will send you, as soon as I get it, an inventory of what they think we ought to have.

I also expect to be able to get on track of some good and experienced men for connecting and riveting pipe through the Risdon.

I would like to know about Foy as soon as possible, as I would like to advise him if we want him, and when we would want him.

Also think you ought to settle as soon as possible about the purchase of the specials and fittings, so as to have them on hand in time. Presume we will need some of them by July. After you have determined where you are going to lay pipe first, you can arrange with the Colonel as to what will be needed this year and only purchase what will be needed for this year—and that we will not have to pay this year for what will not be required until next year.

Yours truly,
J. McMULLEN.

Received March 20, 1893.

Answered March 21, 1893.

[Endorsed]: Filed Mar. 2, 1896.

J. A. Sladen, Clerk.

[761]

Defendant's Exhibit "J."

McMullen vs. Hoffman. Defts. Ex. J. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., March 24th, 1893.

Mr. Lee Hoffman, 53 Worcester Blk., Portland, Oregon.

Dear Sir: Your letter of the 21st inst. to hand.

I am very sorry that the committee engaged an objectionable engineer. Still I believe that we can get the Colonel to stand in with us on anything that is reasonable and overrule Clark.

I herewith enclose you copy of an extract from a letter I have just written Mr. Lockwood. After Lockwood has seen Foy, and reported to you, I wish you would let him know positively whether you want Foy or not. I am sure that Foy can get a job, but I think that he would a little rather work for us than for Kelso, as he would be nearer home. As you know, he bought Catt's old place in Seattle and has his family there.

Frank Smith, one of the principal pipemakers here, after the Risdon, whose bookkeeper lives in Alameda, near Mr. Krusi, and they are neighborly, says he is entirely satisfied that the Risdon and Wolff & Zwicker pooled on this last job; he said we would never have gotten the job at any such price as we did if they had not gone together. He says that the Risdon thought that Wolff was going to get the job anyway, and that there was no one else that would go low on the work—and, hence, they went in with him. When I think how the

[762] Captain acted before and after the bids were in, and how strongly he recommended us to sell out to Wolff—I am almost tempted to think that there is something in this. What do you think?

What do you think of Catt's idea of sub-letting the digging of the ditch? Do you not think you could let the digging of it by contract for 15 cents? I do not mean the filling of it, simply the digging! On the whole, I do not think we could make anything by sub-letting it—even if we could let it for less than we can dig it for; I still think that we ought to have full control of this part of the work, even if we do not make

anything on it, and I am quite sure that there is nothing in attempting to dig it with a machine.

Yours truly,

J. McMULLEN.

Received March 27, 1893.

Answered March 27, 1893.

[Endorsed]: Filed Mar. 2, 1896.

J. A. Sladen, Clerk.

Defendant's Exhibit "K."

McMullen vs. Hoffman. Defts. Ex. K. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., March 27th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

[793] Dear Sir: In re-reading the contract between you and Wolff & Zwicker I observe that there is no provision or mention made of their giving you a bond. I understood that they were to give you a bond in a proportionate amount to what you gave the water committee. Of course, I know they are responsible, and believe they will do the work, but, as a matter of business, I think it would have been as well to have had them furnish you a bond guaranteeing the completion of the work, and I understood you to say that they would—that there was a bond provided for. Has it been overlooked, or did you agree to waive it, or did they give it, although no mention of it was made in the contract?

Your letter of March 25th at hand and noted.

I think, too, that station men will be the cheapest way of digging that ditch, and if this should prove to be a success, we might arrange to have them do the refilling and tamping.

I understand from pipe men that it is very desirable to have the excavation put all on one side—the opposite side from which the pipe is delivered—so as to have a level place on which to roll the pipe and put it together, very materially cheapens the laying of it in the ditch, as against having to take it up over a spoil bank and down into the trench.

I will leave it with you to finally determine how we shall do this ditch, and whatever you do will be satisfactory to me. Personally, I would defer a good deal to Foy's judgment in the premises, as he has had a good deal of experience in these matters.

Julia E. Hoffman, Executrix, etc.

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[764] What I am saying now about letting the digging of the ditch to station men, don't want you to understand conflicts with what I said before about not sub-letting it, because I am much opposed now as I ever was to sub-letting the whole thing—the digging and refilling—to one party, as I do not believe we would get a satisfactory service in that way, and we would not have the same control over the work that we would have by letting 3, 4, or a half-dozen station men dig a mile or two miles apiece. I think we ought to make 5 cents a yard on the earth excavation, at least if we let it out say 15 cents for excavation and 10 cents for refilling.

Yours truly,
J. McMULLEN.

Received March 30, 1893.

Answered April 3, 1893.

[Endorsed]: Filed March 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "L."

McMullen vs. Hoffman. Defts. Ex. L. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., April 13th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: I have not written to you lately—have not answered your last letter, because I had not anything to say, as [765] I have not heard from Lockwood about Foy. I saw Kelso, and I inferred from what he said that he would have work on the Northern Pacific job for Foy until at least the 1st of June, and Foy is a conscientious man and would not leave Kelso until he got well through with the job.

Our Mr. Wood has had some conferences with the Risdon people relative to tools and equipment for laying the pipe, and also prices on specials.

We enclose you copy of a communication from the Risdon, and a list of the tools they purpose to furnish, which, in their judgment is what we will need.

You might get Wolff & Zwicker to give you a list and price on what they think we ought to have, and then I think you ought to give the contract to one or the other of them, as it will take 3 or 4 weeks to get the tools made and shipped on the ground, as I understand many of them are specials, ham-

mers, etc., are of special design and make, and cannot be gotten in stock.

I am glad to tell you that Mr. Dyer, of the Risdon Iron Works, is going to represent the Risdon people at Portland; expects to go there the 1st of next month, and to have an office and stay permanently, and will look after the proper delivery of the iron, and will also look after other business in that territory for them. I think it will be of great advantage to us to have the benefit of Dyer's judgment and experience—as he has been a superintendent or rustler in the field on 2 or 3 large jobs of pipe work that the Risdon have done, aggregating some 30 or 40 miles of substantially the same character of work as this job; two of these jobs were for the Spring Valley and one was at San Diego. Dyer knows the difficulties and delays encountered and methods pursued on these jobs, and has good ideas as to the kind of organization and superintendence that we will need. I think it will be worth our while to make it an object for him to take an interest in our work by giving him, say \$100.00 a month, or \$500.00 a season at least for the first season, to tell us what he knows, and to keep us straight so far as he can.

I have personally had several talks with Mr. Dyer about the method of operation, and the difficulties to be overcome. When he gets to Portland you can have interviews with him, and you will find that he has a good bit of experience, and can give us valuable hints. Dyer says that they tried a great many different ways of digging the ditch, and that their sub-contractors also tried many different ways, but that they had to come back to the old original way of plowing it, and throwing the material out by hand, and fill it in by hand, too. He said the first two plowings—they used spans of horses, and on the other plowings, near the bottom, they used horses tandem, and plowed about 1,000 feet at a time. The Risdon people tell me that it is very important to have the ditch dug just right; that is, straight and level—at least straight on one side against which the pipe will be laid. Todd, the Southern California pipe man, told us the same thing: that the accuracy with which the ditch was dug greatly facilitated the rapidity with which we could lay the pipe.

Mr. Dyer says that it will be necessary to cover the pipe at

it at 5 or 8 inches just as soon as it is coupled up in the ditch, and before the joints are finished, to keep it from contracting and expanding and tearing itself to pieces. The necessity for this quick work, he claims, precludes all possibility of using scrapers for back filling, but it seems to me that scrapers could be used at least to fill in the last foot or two after the joints are all completed, and to level off the ground as the work of refilling is completed.

Another matter that I wish to call your attention to early, and which I think we can fairly assume belongs to Wolff & Zwicker to do, as they contracted to deliver the pipe at the shop ready to lay in the ditch, is this: The cleaning of the asphaltum off the ends of the pipe, where they are slipped together, and the reaming out of the asphalt from the rivet holes in the ends of each section of pipe. Loyer says this is quite a job; estimates that it will cost \$10.00 per day to do this, which would amount to about \$3,000.00, or in that neighborhood, on the job; he says it often has to be done at night; that during the day, when the iron is hot, the material is too plastic, and that it is only brittle and susceptible of being scraped off when the temperature is cool. I think that we can fairly assume that Wolff & Zwicker are to do this; that it is their job, and take it as a matter of course that they will do it.

Now, Lee, I want to call your attention to the fact that we have got to get together quite a large organization to do this work. As I figure it—deducting out sub-contracts, and assuming that half the value of the specials is material and the other half labor, and deducting our estimated profit, we will have left about \$150,000.00 to expend in 10 months in labor, or \$15,000.00 a month, approximately \$600.00 a day. Now, assuming that the average wages of skilled and unskilled labor will be, say \$2.50 per day, we would employ 240 men a day. Now, to direct, superintend, and oversee efficiently this number of men, and look after a commissary for them, will require quite a staff of foremen, superintendents, timekeepers, engineers, etc. This, however, is probably a larger number of men than we will employ. As there will be 10 or 15 per cent for administration and incidentals, that would have to come off this estimate of money for labor. I think it is of the utmost importance to run a good, clean, orderly commissary. I think

we will have to have two or three regular stations, camps located a mile or three-quarters of a mile apart, so that we can cover a mile and a half or two miles of the pipe line without requiring the men to walk too far to get their meals. Dyer says that they had a great deal of trouble in this on the last Spring Valley water job—said the boilermakers would not eat at the same table or in the same camp with the laborers, and that they had to keep wagons to haul them to and from the work. I think both these things wrong, and that we should not tolerate them. I do not think that the work ought to be more than a half-mile from the camp. In this way 3 camps a mile apart would cover 3 miles, and they would only have a half a mile maximum distance to go; perhaps two camps covering 2 miles would be sufficient. I think we ought to have a first-class man to look after this commissary, and good assistants, and it ought to be run on lines so that we would make some money out of it, and should be well conducted, so that the men would be satisfied.

779] I quite agree with you not to start this job with any union boilermakers. I think this of greater importance than anything else; that is, to do the job with men that we can control, and who will not attempt to control us. As I understand it, a union boilermaker will not work on a job where there are non-union men employed at the same work. If the boilermakers adhere to this principle, I do not think we want a single union boilermaker on the job.

The Risdon figure that we will require about 12 gangs to do the work at the required speed; that is, to couple up and make the joints in the field—a gang to consist of 2 riveters or boiler-makers, as they designate them, 1 man in the pipe, who puts in the rivets and holds the heads of the rivets with a mandrel, and a boy to heat rivets; this is 4 in a gang, or a total of 48 men. Besides this, they figure on extra men to take the place of any one who might drop out, or who would go away, or be off for a day or two. They figure on 5 caulkers, 15 handlers—that is, those placing the pipe in the ditch—5 cleaners—cleaning the ends of the pipe, if not done before shipment—and 5 foremen, or a total of 80 men. Assuming that these men average as before—\$2.50 per day—would make an expense for putting the pipe in ditch and riveting \$200.00 a day, or \$5,000.00

770] a month—in 10 months, \$50,000.00, which would leave \$400.00 a day for riveting and refilling the ditch, which would amount to \$10,400.00 a month—10 months, \$104,000.00. Yet I apprehend that this is approximately a fair distribution of the relative cost of the excavating and of the pipe laying, namely, \$50,000.00 for the pipe laying, and \$100,000.00 for the excavation, and a total of \$15,000.00 (fifteen thousand dollars) a month—10 months, making \$150,000.00. This, of course, is only roughly approximate with a view to get an idea of the number and class of men that will be employed, and with a view to the proper administration of the work.

Besides a general superintendent, I think it will be necessary to have an engineer on the work all the time to look after the accuracy of the ditch and the grades, and the holes in excavations in the ditch at the joints to permit riveting. These holes, I understand, want to be located very accurately, and many other things will require to be looked after by an engineer, who has accurate ideas, and is comprehensive and quick to see and calculate and lay out work. Do you agree with me about this? If so, have you any one in view? If you think our Mr. Wood would be a suitable man for this position, I do not know but we could arrange to spare him for the summer, and let him go there and be on the work. He takes quite an interest in this contract, and thinks he could be of great service to us there—and I have no doubt of this. Let me know your mind in this matter as if he goes there he wants to know it as early as possible so that he may make his domestic arrangements accordingly.

It is getting on towards the time, and I think we ought to arrive at some definite idea as to how we will organize and arrange the work, and I will be pleased to get a letter from you at your earliest convenience—going over the whole subject.

[771] The Risdon still maintain that the best way to make the angles is in the field, and for this purpose they have on a wagon, which is drawn along the line, a little punch, shears, and rolls and with these tools the bends are made and fitted and riveted right on the ground. I had not thought that this was the best way to do it, but their experience ought to be more valuable and more reliable, and more practicable than any theory that

we might think favorably of. This portable punch, shears, and rolls, you will notice are included in their list. Dyer says that these items amount to about \$500.00.

Yours truly,

J. McMULLEN.

Received April 17, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "M."

McMullen v. Hoffman. Defts. Ex. M. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., April 18th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of the 14th at hand and noted.

We were a little slow in getting the prices that you asked for from the Risdon, as we had to keep after them about once a day for ten days to get out of them the prices and information that we sent you with our last letter.

[772] We note what you say about rivets. As I understand it the principal thing about the rivets is to get the right quality. Are the ones you have bought of the same kind and make as those Wolff & Zwicker will use?

I think it will be fully a month before Wolff & Zwicker's machinery will be shipped from the Risdon, so they could not possibly get it set up and ready to work before the 1st of June.

I note what Lockwood says about Foy. You seem to want me to decide as to whether we put Foy on the work or not. Now, I do not want to do this, Lee. I have told you just what I think about Foy and you see what Lockwood says of him, and I want you to determine whether you want to put him on the work or not; if you do, and write me to that effect, I will write Foy personally, and tell him that we want him, and when we want him, and I think he will come, but he will not come without we make him know that we really want him, as he is a man that is in demand, but I think he will come for me, if I tell him we want him; I suppose you would want him about the 1st of June. If you think you can do better I am perfectly willing you should not engage him, as you are to be the executive man on the job you are the man to decide and select your men. If I were the executive man, going to run the

job, I would put Foy on it in preference to any one I know, as I believe him competent to take charge of the whole proposition, and I think you want some one in charge over everything (including the commissary) and general manager or superintendent, who will be on the work all the time. We would probably want him a year and a half. His wages would amount to about \$4,500.00, which would not be a very considerable sum, in view of the fact that he would have the administration of in the neighborhood of \$150,000.00 of labor. Of course, Foy knows nothing about the technic of laying pipe. To do this rapidly and economically I think we will be largely dependent upon getting some good foremen and men in each gang, for moderate wages, to do this expeditiously, thoroughly, and rapidly—and it is to be boss or superintendent over all these that I recommend Foy, as he has had experience on large jobs, and over large gangs of men, and knows how to manage them. I think you would find Foy a great help to you on this work. I have no doubt, however, but that you can get good men for \$150.00 a month to act in this capacity. Assuming it will take a year and a half, this would make a saving of \$1,800.00 or \$2,000.00. Now, it is a question whether this would really be a saving or not. As I have indicated to you, my preference would be in favor of Foy.

We built about 3 miles of trestle work to carry pipe for the Spring Valley Co., some \$70,000.00 worth of work. This was on a job where the Risdon made and laid the pipe, and Bob Moore was always telling me what a rustler and good man Foy was; they saw a great deal of him on that job. Foy also ran the seawall job for us here in San Francisco; was on it about a year, and the last job he was on for us was on the Great Northern Railroad work, about \$300,000.00 worth of work, on which he had exclusive charge—hired and discharged everybody, bought his supplies, looked after transportation, ran the store, looked after the commissary and subcontractors; in fact, he had too much to do on this job; did not have enough good assistants, but I am satisfied that on this [774] work he did as well as any one could have done under the circumstances. If you write me to engage him, I will do so if I can, and I think I can. On the other hand, if you have some one else in mind, and think it is too

much money to pay, I shall be entirely satisfied with your decision in the premises. So, too, about my suggestion of putting Mr. Wood on the work. If you have some one else in view, or if you can spare Mr. Bush, and think he is fitted for that position, I am agreeable, but I think we will need some one in the capacity designated under Foy. In fact, it would be quite an inconvenience for us to spare Mr. Wood for this work, as we would not have any one to look after our bridge designing and estimating, except Mr. Krusi down here, and Lockwood and Cooper up there, and Krusi is mainly on the road.

Also want to hear from you on the other subjects considered in my last letter.

I remain,

Yours truly,

J. McMULLEN.

Received April 20, 1893.

Answered April 20, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

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Defendant's Exhibit "N."

McMullen vs. Hoffman. Defts. Ex. N. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., April 22nd, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Your letter at hand and noted.

I do not care how quickly you fire Risdon, or any proposition they make. I did not intend in any way to recommend the price that they made on specials or fittings, as I did not know the first thing about the real value of this class of things. I thought the bid they made for the outfit to lay pipe with was reasonable, but, of course, the Risdon are just like you or I—if you had an opportunity you would get a good price for your work; in other words, do one up—if they did not know it.

I agree with you that the bridge men are better than boiler-makers to do the riveting, and have no doubt that they can be trained so as to do caulking, too. We have no iron bridge men around us, but have no doubt we can get together quite a number on this coast. I think also that we can get a lot of cheap

[776] pipe men from Southern Cal., where they have been doing a great deal of this work; am going to confer with Todd relative to this. It may be necessary to get bridge riveters, some half dozen, say, from the east; if we get one or two from two or three different shops, each of these would know a dozen others that they could write to, and in this way we might be able to get an efficient force together. As you know wages are about 33 1-3 per cent lower in the east than here. Let me know if you do not think it would be worth while to have our Mr. Catt, or some one from our New York office, go to the Edge Moor people, and two or three other large bridge shops, and get them to give us one or two good men—with view that these men would have connection, and bring others. Of course, before we did this we would want to determine what wages we are willing to pay for this class of men; or, perhaps, it would be better to determine what they could get in the east, and then give them a little more as an inducement to come here.

You cannot find anybody who has less use for boilermakers, or trades' union people, than I have.

To answer your question direct—I do not know how many such men we could find here, but think we could probably pick up 10 or 12 by conferring with the different foremen, and getting them to recommend us men for this work. I am quite sure, however, that you will have no trouble in getting men enough when people know that the work has begun; of course, it is important to get a good gang at first; not to lose a month or two in getting to running at full blast—as the time is short. I think very favorably of getting a few good men from the east—even if we have to pay their fare out here, and give them pretty good wages—that they might draw others after them. However, we will do just as you direct in this matter.

[777] I have this day written Foy, offering him the job and asked him to be ready at the 1st of June; will advise you as soon as I hear from him.

I remain

Yours truly,

J. McMULLEN.

Received April 26, 1893.

Answered.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "O."

McMullen v. Hoffman, Defts. Ex. O. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., May 12th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: I inclose you copy of letter from Foy, and of my answer to same. This settles the matter as I understand it.

Two or three foremen have made application for a job; some of these men were recommended by Moore of the Risdon, and some by Schussler of the Spring Valley Water Co., and some by both. We have kept their names and addresses, and promised them that if we needed them we would communicate with them; they are mostly foremen for digging gangs; one especially seems to have had charge of the laying out and excavation of the joint pits. If you should need any of these men, [778] communicate with us and we will send them forward.

The Ferry foundation is up for bids on the 16th. I do not suppose you will care to rustle it again; if you do, you had better show up. Understand about the same number of plans have gone out—13 or 15; also understand that Bateman Brothers claim that they are going to enjoin the Harbor Commissioners from entering into contract with anybody but themselves. You will remember that they were the low bidders before, and brought suit to compel the Harbor Commissioners to give them the contract; the suit was decided against them; they now threaten to bring new suit.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2. 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "P."

McMullen v. Hoffman, Defts. Ex. P. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., May 18th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of May 15th at hand and noted.

Mr. Wood attended the letting at Sonoma for us, and the bids were not opened. The matter went over to the July meet-

[779] ing to be readvertised on account of some illegality or want of funds in this fiscal year. Mr. Wood is not here now, but I delivered your papers to him, and told him to take address off them, and to slip them in quietly. You will understand that he did not care to call for your papers after the bids were rejected.

You had better write to the clerk, W. F. Wines, and have him return them to you. The bids that were submitted were on a fight; no pool.

Have you heard from Foy yet and how does it look for starting the work early in June?

We got the Ferry foundation the other day—\$248,000.00; it was wide open, and, as you see, we were out for the job. I think the other boys, mainly were faking; afraid of it. We beat them, as you see, about \$42,000. I do not think we could have gotten \$40,000.00 more for the work; as it was our bid was several thousand dollars above the architect's estimate, and the chairman of the Board told me, privately, after the bids were opened that they would not have awarded the contract at a much higher price than we did; of course I do not know how this might have been. However, if I had known the boys were all so far away from me; I should have tried (the board) on for about \$25,000.00 more.

It is conceded that the job is worth about 25 per cent or \$100,000 less than it was at the former letting, so you know whether there is anything in it or not. With fair luck, we think it will be a fair contract; we believe, in fact, that it is good for 10 per cent.

Yours truly,

J. McMULLEN.

Received May 20, 1893.

Answered May 23, 1893.

[Endorsed]: Filed March 2, 1896. J. A. Sladen, Clerk.

[780]

Defendant's Exhibit "Q."**McMullen v. Hoffman, Defts. Ex. Q. G. A. B. Ex.****San Francisco Bridge Company.****San Francisco, Cal., June 6th, 1893.****Mr. Lee Hoffman, Portland, Or.**

Dear Sir: Mrs. Hoffman and Hawley were in to see us last Saturday; they went out to the house and took lunch. I think Mrs. Hoffman is looking very well, and Hawley is growing like a weed.

We have the forges ready and can ship them any time.

I saw Capt. Taylor a day or two ago, and he said he had just gotten in from Portland on his way home from the east; he said when he was in Portland (which was the middle of last week) Wolff & Zwicker had not started to make any pipe up; I suppose they are started by this time.

Mrs. Hoffman told me that she heard you say that Foy had just got there before she left.

I would like to know when you expect to begin to lay pipe.

We have the addresses of several men here, recommended by the Risdon and Spring Valley, as foremen for trenching and pipe laying, etc., that we will send to you if you so desire.

Bob Moore told me that we could have the use of the caulking tool for the pipe line for \$500.00, and I told him this was satisfactory. Don't you think it is worth this to have on the ground there to hold the caulkers down with? If we are going to do anything with it, we would have to have 2 or 3 of the tools, which would cost us something, I do not know how much—\$75.00 or \$100.00 apiece, I believe.

When Wolff & Zwicker get to using this I think you will see that it is a very efficient tool. Let me know about this, and how you are getting on generally.

With regard to money matters, Lee, I expect it will take a little money to run the job the first few months, until we begin to get decent estimates, but I do not think it ought to take a great deal if we keep old man Smith's estimates up full and prompt. What I would like to do about the money is to put up our joint note, the Bridge Company's note in conjunction with yours, there in the bank, and open a joint account for you to run this job out of. I have no spare cash just now to put into it, and I would like to know what you think about

Julia E. Hoffman, Executrix, etc.

this and if it will be satisfactory to you, and how much money you think it will take.

Am sorry you did not get time to come down here before you began to lay pipe, as it will be difficult for you to get off now.

Yours truly,

J. McMULLEN.

Defendant's Exhibit "R."

McMullen vs. Hoffman. Defts. Ex. R. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., June 15th, 1893.

Mr. Lee Hoffman, No. 53, Worcester Blk., Portland, Or.

[782] Dear Sir: Yours of June 9th, inclosing schedule of wages that you propose to pay on the pipe line, at hand and noted.

When you get started and need any more boilermakers or riveters we will see if we cannot rustle up some more men at the prices mentioned.

We have a pair of good, large, strong horses out at pasture, in Colusa county, where we built the irrigation ditch; they have not done anything for a year and a half. If you are going to buy some, I think it would pay to have a man take these horses through to Portland, as I do not think it would cost more than \$75.00 to get them there and I think they ought to be worth \$200.00 or \$250.00 when they are once there, and they are worth nothing where they are. If you have not already bought horses enough, and can use these, and are willing that I should send these horses up, I will do so, and you can credit me what you like for them.

I did not think it would take so much money to carry that job as the amount you mention. I do not think so now. I do not understand that you purpose to pay anything each month until you get your estimate for the preceding month; then, as you get 90 per cent of what you do, it seems to me that we ought to run the job after we get it started, and the plant and camps on the ground. Later on I shall not be so hard up, but for the next 2 or 3 months I shall not have a dollar to put into anything.

I think, from what I can learn here, that the financial situation is very much exaggerated, and that it will all be over in-

[783] side of 60 days, and I believe that there is plenty of money there in Portland. I shall get up there by-and-bye and see what I can do.

I saw Mrs. Hoffman on her return from the valley the other day; went to hotel again to-day, but she was not in; understand that she intends leaving to-night or to-morrow night; am very sorry that Mrs. McMullen is out of town, and that she cannot entertain Mrs. Hoffman; we are at Blythedale, Marin County, for a month.

Let me know how the pipe goes together, and how fast they are able to make it; they ought to be pretty well started by this time.

Yours truly,

J. McMULLEN.

Received June 18, 1893.

Answered June 20, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "S."

McMullen v. Hoffman. Defts. Ex. S. G A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., July 6th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Or.

Dear Sir: We send you per this mail copy of a paper read by Clemens Hershel on the works of the East Jersey Water Company, before the New England Water Works Association, which was sent us by Mr. Catt. We enclose Mr. Catt's letter [784] which accompanied this report. Perhaps you may find something in the report that may be of benefit to us.

We enclose you copy of list of tools and plant shipped by Lockwood from Seattle; we do not know whether he sent you a copy of this or not.

We also send you statement of what we have charged on our books against the job to date.

Now, Lee, as to finances: I have never been so hard up since I have been in business as I am at the present time, and it is mainly due because people do not pay. We have over \$30,000 out that it is utterly impossible to collect in the present state of the money market, although all of it is overdue; some of it many months overdue; some of it many months overdue. Secondly, we got loaded up with a lot

of county warrants at Seattle and Spokane. Thirdly, while our Eastern business has been first-rate and successful, yet the returns have been much slower than we anticipated; this has been caused mainly by our having a loan in New York, with irrigation bonds as collateral, and the financial stringency there caused our New York bank to make us take up this loan. I hope you are in position there to handle that business for the first 3 or 4 months; after that time I think we will be in shape to stand in and pay our part of whatever may be needed. I am willing to pay any interest that you think reasonable, and am also willing to put up my individual or the Bridge Company's note to guarantee the payment with any bank there, if you so desire. Of course, I know that you are running the job with just as little cash as possible. I thought, however, that Smith would allow us estimates on the rivets and fittings up-
[785] on their delivery in Portland.

I need not tell you what you already know; that is, there is a great deal in keeping your estimates up full, and getting in everything. Neither do I wish to interfere with your method of doing business, as everybody has their own way, but if I were running it, I would not pay anything on account of it except my contracts and labor till I was in easy circumstances; in other words, I would make the people carry me with whom I did business. That is what we do.

I will be glad to get a letter from you, and to know how you are getting on laying the pipe, and also if you can pack the job for a few months.

I am informed, by people who are in a position to know, that finances are sure to be easier from this on, and I think within 60 days they will be in their normal condition again. Don't you think you can arrange to get a loan up there on our joint notes of \$10,000.00 or \$15,000.00 to carry on this job from Ladd & Tilton? I suppose you would not care to open an account with anyone else. I did not know but that you would like to have this arranged in this way, and pay all bills on account of that job in this way—out of a special bank account—instead of running it in with your own bank account. Let me know about this.

Now, Lee, I do not want you to think that I want to fall down, or go back on you. I believe that you know that we did our part toward getting the job, and before we get through

I am satisfied that you will concede we have done our part
[786] toward executing it.

By the way, do you think Foy is the right man in the right place? How do you like him?

I have your letter of the 20th of June.

Our man tells me that he reported to you about the pipe left at the hotel; am sorry you could not recover it.

With regard to the charges Lockwood has made for the stuff, I do not know anything about it; I leave it entirely with you to make them whatever you see fit.

How do Wolff & Zwicker get on manufacturing?

Hope to get a letter from you shortly.

Yours truly,

think about this?

J. McMULLEN.

P. S.—We are in receipt of the profile and specifications from Lockwood for the Eleventh Street Bridge at Tacoma, which is a large and expensive job. We are going to send east to Catt for bids on the material. If you want to, we will go in with you on this job, Lee, and pool our issues, and see if we can get the job on joint account. I think we will have to bid for the work; do not believe it can be pooled. What do you think about this?

J. McMULLIN

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[787]

Defendant's Exhibit "T."

McMullen v. Hoffman. Defts. Ex. T. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal, July 22nd, 1893.

Mr. Lee Hoffman, Portland, Oregon.

Dear Sir: Yours of July 14th and 17th at hand and noted.

I am extremely sorry about the rivets. Moore of the Risdon always and often cautioned me about the rivets; told me the trouble they had had on different jobs about them, and you will remember I wrote you about this. However, the only thing to do is to get them right as soon as you can possibly.

About the hard digging, I am a little surprised at what you say about its costing 50 cents a yard when you get the stuff out. I think, however, that when you have done 5 or 8 miles of it you will find this cost will be reduced. You know a new

job always costs more at first, until the men get accustomed to it, and know exactly how to do it. I would not wonder if the excavating and pipe laying for the first month or two would cost you from 25 to 40 per cent more than it will after you have been working for six months.

How about the pipe riveting and pipe caulking labor? Is it cheap and good and plenty?

I think steam to plow with will be economical and efficient, and the sooner you adopt it, the better, and the more you will save. A good big donkey engine with $\frac{3}{4}$ or $\frac{1}{2}$ inch wire cable will be about right.

[788] I am glad that you find Foy's assistance valuable.

I see that the submerged pipe is advertised for August 15th.

I hope to get up to Portland by that time, or sooner. Catt has already received the specifications. I enclose you a copy of a letter from him on this subject. I do not know whether he is right about this or not, but I do know that work like ball joints or in cast-iron work with machine work on it, is about a cent a pound cheaper in the east than it is here. I think the most important thing on this job though is to pool it. To this end you ought to know exactly who makes inquiries about it, and who gets specifications. I infer from Catt's having specifications that they have been sent east, and that it is advertised in the east, although I have not seen anything of it as yet. Catt can probably find out who is figuring on it on that side, and perhaps he can corral them when the time comes. I have not seen the specifications and plans, but presume that they are in such shape that a man would not have to be on the ground in order to bid. Kindly send us a set of the blue prints and specifications.

Now, Lee, with regard to money: I recognize that it is incumbent upon me to put up half of the money to run that job with, and I stand ready to do anything that it is possible for me to do, but for the last 60 days I have had all I could do to get along, and it does not look a bit better for the next 60 days to come; after that time we will begin to get in some money. I think we ought to be able to raise a loan in Portland on joint account. I am not only willing to put up the Bridge Company's note for it, but I am willing to deposit as collateral with said note 14,032 out of a total of 25,000 shares of the capital stock of the company. A fair valuation of the company's

[789]

assets, over and above its liabilities, shows it to be worth over \$375,000.00; this would make this stock worth \$15.00 per share, or total of \$210,480.00. Don't you think it would be better to borrow the money on joint account there, so as to use your credit and ours, too, and instead of my borrowing \$10,000.00 let us go in together and borrow \$20,000.00, or \$30,000.00, or whatever sum is needed? Open a bank account. We certainly ought to get this money in Portland, Lee; that is the proper place, that is where the work is. I am willing to give my note and pledge my stock in the company with you and borrow the money from an individual—some capitalist, you should know some one—if you prefer. I am willing to do anything that I can do, and were it not for this unlooked-for financial stringency, I could probably have sent you the money from here, but, as I have explained to you in my former letters, you know how I have been crowded on account of this stringency.

I note what you say about Wolff & Zwicker having a soft contract. I always thought we could have let that contract to them for about \$25,000.00 less than we did, but, however, I am glad that we let it to them, as I am satisfied that they have spent \$40,000.00 or \$50,000.00 for plant, and when a man does that he ought to make some money. I still believe with you, that there is money in the job.

Yours truly,
J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[790]

Defendant's Exhibit "U."

McMullen v. Hoffman. Defts. Ex. U. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., July 24th, 1893.

Messrs. Hoffman & Bates, Portland, Oregon.

Gentlemen: Yours of July 20th at hand and noted.

Our agreement with Foy is that he is to be paid \$250.00 per month, same as we have always paid him. Now, I rather think that when we had a camp we always boarded him for nothing here in California, and think they did the same thing up there.

Enclosed you will find copy of our letter of Apl. 22nd to Mr. Foy; this, with the letter of May 12th, are all the letters we wrote him on this subject. I was thinking you had a copy of this letter, but find you have not. Of course his traveling expenses around on the job I would expect we would pay, so it really amounts to \$250.00 per month and his expenses—as we understand it; we think this is what we have always paid Mr. Foy.

Yours truly,

SAN FRANCISCO BRIDGE COMPANY,

By J. McMullen. Prest.

Received July 26, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[791]

Defendants Exhibit "V."

McMullen v. Hoffman. Defts. Ex. V. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., August 3rd, 1893.

Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

Dear Sir: We note yours of July 31st.

It is not possible for me to make the remittance you demand. Were it, you would not have to demand it. It is possible that I may be able to send you \$5,000.00 next week; this, however, will depend on whether we succeed in making a certain collection. I can only tell you that I will do my utmost to furnish some funds to help handle that job, and for what money and time you put into the job more than I do, I trust I shall be able to make you a satisfactory compensation.

I think you are too sensitive about paying everything when it is due; no one here does that these times.

I will tell you what I do in my business: when I have money I pay, and when I do not have money, I tell the people so, and let them wait, and people with ten times the money and resources that I have treat me in the same way. Our labor is the only thing that we strain a point to meet promptly.

Had I been running that job, everything I bought for it I should have agreed to have paid when I received my estimate on it—when it went into the work. A firm with your credit could readily have done this. This is what we do invariably.

[792] If, as you intimate, the city should not pay it seems to me that would be sufficient reason for your not paying, and that you

ought not to be worried on that score. It is hardly fair for you to intimate that I asked or expected you to furnish all the money and do nothing but run that job, after I have explained to you that it was because I was utterly unable to send you any money at this time. Neither is it just for you to accuse me of going into other schemes and taking other work and putting my money into them. As a matter of fact, we have not taken a contract or put a dollar into anything since we went with you into the waterworks contract, and furthermore, we would have been in funds to pay our proportion of it had it not been for the financial stringency and inability to collect, which I reported to you in detail. If you allude to the job we are doing in Arizona, I wish to say to you that job is being done on a commission basis—not a contract at all, and instead of requiring money for running it, it has been a source of income to us, as we get 10 per cent on the labor and all expenditures monthly. I realize that it is not the explanations that you want; that it is money, and I will try and see what I can do. Meantime, stand them off.

Your etc.,

J. McMULLEN.

Received Aug. 5, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

793]

Defendant's Exhibit "W."

McMullen v. Hoffman. Defts. Ex. W. G. A. B. Ex.

San Francisco Bridge Company.

San Francisco, Cal., August 4th, 1893.

Mr. Lee Hoffman, Worcester Bk., Portland, Oregon.

Dear Sir: Yours of August 2nd, relative to caulking tool, at hand and noted.

We have just interviewed Risdon, and wired you as follows: "It will require one of these compressors to each tool; can furnish two. Moore thinks one tool ought to do the caulking as fast as you require. Have written."

It seems to me that the best way to do this would be to set up one compressor and one tool first with donkey boiler on a wagon; then if it should do the caulking as rapidly as you require it done, use one only; if not, we can get a second one, and put it on the same wagon, and use the same boiler.

The steam cylinder of compressor is 6 x 6, and reservoir a kitchen boiler, obtainable at any hardware store, 1½ feet in diameter, and 5 feet long. The Risdon have two of these on hand, and we can ship them at any time; also the tools.

[794] I show the Risdon your letter, and they are a little inclined to recede from their arbitrary and advance price for the use of this patent; I think they will accede to the original proposition of \$500.00, and we pay for the tools besides—which is about \$75.00 apiece. I am quite sure that before that job is done you will want this tool on the job—even if you do not use it; it will hold the strikers down. I wrote you this before. Just as sure as the men think that you are depending on them, they will get together and jump you when you are in a hurry. I think I would adopt the machine and operate it. You see how it works for Wolff & Zwicker, and you can tell for yourself whether it is more economical than hand work; it seems to me that it must be; it is only a question of operating it skillfully so as to make tight work.

I hope the committee do not default in their payment. The Risdon are terribly anxious about this, as they claim to have delivered \$50,000.00 worth of material and to have \$40,000.00 worth on the way, and I know that they are awfully hard pressed for money like the rest of us.

I am glad that you think that you are getting along well. I think, too, that three miles in practically the first month is excellent work. Sorry that the digging is so hard, and that it is costing so much.

I am going up there one week from Saturday; will be there week from Monday morning.

I do not want to let go on that submerged pipe; want to get the job; I think we can make \$25,000.00 on that job, but we must pool it; to do this, we will have to let the secretary, Frank T. Dodge, in, and if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened, and we will gather in everybody that is personally represented; don't think there is many.

Riffle has applied to MacNeal's agent here for bids on the cast iron, but we can control MacNeal's man here; he wants to work with us; his price will be about \$32.00 a ton, and freight and insurance, primage and use of money, etc., which will

[795] amount to about \$12.00 a ton, and which will make it about \$44.00 a ton.

I enclose you a rough, approximate estimate which our Mr. Wood has made, which shows that the wrought-iron pipe is not in it at all; that it will cost \$20,000.00 more than the other.

Another thing, Lee: you want to see Smith & Watson, and see that they do not form any combination with anyone else to bid on this work; take them in by giving them the cast iron, and hold them down to about what it is worth.

The estimate we send you is made off-hand, and is rough and only approximate.

I think you can arrange to get Dodge into our camp.

About money, Lee, I feel just as badly and just as much annoyed at being unable to do my part as you do. I have been rustling to-day to see if I could not raise a loan, but thus far I am unable to do so. I have some hopes of getting \$5,000.00 next week; it is 6 months' interest on our irrigation bonds, payment of which has been restrained by injunction, but we hope to have it removed next week. If I get this money I will send it to you, although I am awfully hard pressed on every side here.

I think you are very foolish to try and meet every payment promptly there. I would stand them off for everything, or pay them fifty per cent, or whatever I could out of my estimates, and such things as supplies for camps I would not pay for 6 months, if I did not feel like it.

[796] Now, do not construe anything that I have said as wanting to run the job, but I think you are too thin-skinned and too sensitive about this paying.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "X."

McMullen v. Hoffman. Defts. Ex. X. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., September 14th, 1893.

Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

Dear Sir: Your letter of September 11th at hand and noted. My idea of the proper solution of the financial difficulty of

the pipe line contract (assuming that the committee will be unable to sell more bonds, and that they will be out of cash, which we do not understand is a certain thing yet, as we understand that they have extended the option of purchaser to October 1st), would be: to deduct the board bill from the payroll, which would leave the latter in the neighborhood of \$15,000.00; apply the \$9,000.00 to liquidate this; take, say \$10,000.00 in bonds, get a loan of say 75 cents on the dollar on this amount of bonds and liquidate balance of payroll; stand off supply accounts entirely, as it is a perfectly fair proposition [797] so to do in view of the fact that the city has not paid you, and no reasonable business man would object. If you have freight bills or contract obligations to meet, which could not be stood off, would advise taking further bonds and hypothecating them as above suggested, and meet such obligations. As I understand contract Wolff & Zwicker and Cook and Kernan they can only demand pay as we receive it from the city, and not otherwise. There is not any doubt but that ultimately the city will succeed in selling these bonds, and probably in 60 or 90 days, at which time you could turn the bonds into cash; have it so understood with the water committee that the bonds you thus accept temporarily shall be turned in on the first sale of bonds. I think that with so good a collateral as these bonds, there should be no trouble in raising money enough there to pay the balance of this year's labor. If there should be difficulty in this, you could shut down the work at the first of October, at which time the last option given on the bonds will expire. The difference between the interest that the bonds would bear and what you have to pay for money could not amount to a very considerable sum for the limited quantity that would be required to take care of the labor account for a month or two. I have not the slightest doubt but what these bonds will be marketable shortly, and trust that the committee will yet realize by the first of October.

My own finances are in such a condition that it is absolutely impossible for me to comply with your request to furnish you \$10,000.00 before the 20th of this month. Neither can I accede to your proposition that I should withdraw from and sur- [798] render my interest in this contract. Neither have I ever intimated in any way that I would do so, as you imply in your letter, except in my letter to you of March 14th, 1893; to the

proposition contained in said letter I am still open; or if you desire to make me an offer for my interest in this contract, I am open to the proposition.

I think, Lee, that in your letter you considerably exaggerate the financial difficulties. I do not believe it will be long until the committee will realize on their bonds, and for the inconsiderable sum it will require to take care of the labor, outside of the board account, I believe that you can readily secure a loan of 75 or 80 cents on the dollar for a block of these bonds, which the committee stand ready to give you on account of the contract. Neither do I believe that you would stand any loss on these bonds, as I think they will shortly be at a premium.

Any reasonable or equitable arrangement that you may make, in this or any other direction for money, will meet my approval, and I will cheerfully bear my proportion of the interest, and for what additional money you may have in the contract more than I have contributed, I am prepared to pay any reasonable interest.

It looks to me very much as if, should the committee be in funds again, the job would be on velvet by the end of this year; that is, that your receipts would be quite up to your disbursements. I would be glad to know if you agree with me in this.

I have heretofore offered you the credit of the San Francisco Bridge Company to assist you in making any financial arrangement that you might desire, if the same would be of any value to you.

I trust that things will look brighter shortly, and will be glad to hear from you further on this subject.

Yours truly,

J. McMULLEN

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "Y."

McMullen v. Hoffman. Defts. Ex. Y. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., Sept. 18th, 1893.
Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

Dear Sir: Yours of September 16th at hand and noted.

Before receiving the same, Captain Taylor, of the Risdon Iron Works, had showed me a letter he had received this

morning from Mr. Failing, chairman of the water committee, saying that they had sold another \$100,000.00 worth of bonds, and that the money would be there not later than the 30th—probably several days sooner.

I should have supposed that you, too, would have been advised of this fact, as his letter was also written on the 16th.

[800] This will undoubtedly make the financial situation very much easier than you anticipated. If you get an estimate of \$66,000, I suppose about one-half of it goes to Wolff & Zwicker and Cook & Kernan on their subcontracts; perhaps a little more; the other half of it should be abundant to liquidate your \$22,500.00 payroll (in which latter I understand there is included the board account which must amount to \$6,000.00 or \$7,000.00 which, according to my ideas of business need not necessarily always be cash every month), but assuming that it is cash, it would still leave you in the neighborhood of \$10,000.00 to pay for other supplies with, or to reduce the amount of money that you have invested in the contract.

[801] You say that you have done business for many years to suit yourself, and will keep on doing so. Now, Lee, I have never made any reflections on your methods. Several months ago, before we started on this work, I told you my ideas of how to conduct it and, with all due respect, I still think I was pretty near right in it. I think you should have made everybody who furnished any supplies for that contract wait for their pay until we got it out of the job; that is, until those supplies were allowed for in the estimate. I have a job here, amounting to a quarter of a million dollars, and every subcontract on it is made on exactly these lines, and you know very well that all large works, works of magnitude, are conducted on these lines. When a party having a contract has a reasonable credit, there is no trouble in placing subcontracts and supply purchases on this basis, and we recognize the fact that your firm had an excellent credit. You elected to differently. You elected to make contracts, and allow people to draw on you when the goods were shipped. Now, of course, if you pay for everything in advance, it may take \$100,000.00 to run that job, but it does not follow that the job could not have been successfully run on \$10,000.00 or \$15,000.00.

I hardly expected such a proposition from you, Lee, that you would refuse to recognize me in the contract if I did not do

thus and so. You must understand that nothing that you can do will change my rights in the premises, and if you attempt anything of the kind you will only injure yourself. If I were in a "kicking" mood and wanted to find fault I might have as much reason with some things that you have done in connection with that work as you have to upbraid me for my shortcomings, but I have no desire to recriminate.

I trust that on more mature reflection, and with the better outlook from the financial horizon, you will see the folly of the proposition that you put forth in your letter.

I assure you, Lee, that you will have no occasion when you get through to have any misunderstanding or row with me, unless you persist in making one; if you do, I shall have to accept the situation.

Yours truly,
J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[802]

Defendant's Exhibit "Z."

McMullen v. Hoffman. Defts. Ex. Z. G. A. B., Ex.
Hoffman & Bates, Room 53, Worcester Block, Portland, Oregon.

Portland, Oregon, Jan. 23, 1893.

J. McMullen, Esq., San Francisco, Cal.

Dear Mac: The Bull Run pipe line will be let about March 1st and it will be wrought iron for most of the line. The committee will take bids on cast and wrought iron, but the cast pipe will have to be the standard sizes, and so I am satisfied the O. I. & S. Co. cannot get more than about 8 miles. Now, Mac, this is a pretty large contract and requires a good deal of capital, and I think we ought to put up some kind of a combination on it. I do not care to have this contract all alone, and I was thinking it would be a good plan if you, Risdon Iron Works, Wolff & Zwicker, and myself, would go in on it together and take the work. I am willing to go in with you alone on the contract, but both the Risdon and Wolff & Zwicker are strong teams, and I think if we would combine we could take the contract and make more out of it than if anyone went in for it by themselves. If you think favorably of this plan, you see the Risdon people and I will see Wolff. Let me know

at your earliest convenience just how you feel about this. The only people I fear up here is Wolff & Z., and I think if we combine this way we would have a very strong team. I expected to be in San Fran. before this time, but things have come up so that I could not get off.

[803] Now, Mac, I don't think we will be able to put up a pool on this work unless we could take in the O. L. & S. Co., and I doubt it very much; if they would come in of course if we found out that we could put a pool on it, each one of us could go in separate.

Let me know just what you think about it.

I see by the papers that during the last storm you lost a large number of bridges in California, so I suppose you are very busy. There is not much in sight up here for the coming year.

Yours truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "A 2."

McMullen v. Hoffman. Defts. Ex. A2. G. A. B., Ex.
Hoffman & Bates, Room 53, Worcester Block, Portland,
Oregon.

Portland, Oregon, January 30, 1893.

J. McMullen, Esq., 42 Market St., San Fran.

Dear Sir: Yours of the 26th at hand and note what you say about what the Risdon people not wanting too many partners. I have been talking with Wolff in an off-hand way, telling him that I thought it would be a good scheme if such a combination could be made, but I think W. & Z. and the Risdon people [804] have some kind of a deal, so I did not say much. As you say we must do some rustling in the east if we want this work—now, my idea is, to get this iron punched and planed in the east, so that all we would have to do here would be to roll it when it came; that would save a lot of machinery, and I think it could be planed and punched cheaper in the east than here. I will enclose you a list of what it will take and the strength required; this will have to be iron (not steel), and I think if you could give this to Mr. Catt, and if he has not got the time to look after it, he could give it to some Iron Broker, and let him

get us good prices and we ought to get this work, or at least part of it. I will go out over the line as soon as the weather settles a little. The specifications are not yet out, but expect to get them to-morrow and will mail you a copy. The committee estimates that it will take $2\frac{1}{2}$ million dollars, to complete the entire work. We would not have to bid on all if we did not wish to. About Wolff & Zwicker's financial ability—they can get all the backing they want here and their credit is very good.

I don't hardly think I will be in San Fran. until after the contract is let. Why could not Geo. W. Gibbs give good prices on the plates? He knows all the plate mills, and ought to do the work on a very small per cent on such an order as this would be. Think it might pay to see him. The O. I. & S. Co. will bid on the entire contract unless we could get them off as you suggested. Any way, the time is short, and we will have to rustle hard to get in shape to make a good bid.

Yours truly,
LEE HOFFMAN.

805]

2000 tons No. 6	B. W. G. 60in. x 138 in.
200 tons No. 4	B. W. G. 60in. x 138 in.
200 tons 5-16 in.	B. W. G. 60in. x 138 in.
800 tons No. 8	B. W. G. 60in. x 112 in.
1500 tons No. 6	B. W. G. 60in. x 112 in.
500 tons No. 4	B. W. G. 60in. x 112 in.
5200 tons total.	

Average length, given—sheets all 60 in. wide.

24 miles of 42 in. 35 in. and 33 in. pipe.

Above material to be iron. Specimens cut length ways of sheet to test as follows:

50000 lbs. per square inch ultimate strength.

25000 lbs. per square inch elastic limit.

15 per cent elongation in 8 inches.

20 per cent reduction of areas at fracture.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant Exhibit "B 2."

McMullen v. Hoffman. Defts. Ex. B2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and Gen-
eral Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, Feby. 3, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir: I left an order with Col. Smith to-day to mail you
5 copies of specifications, as per your telegram. He expects
to get them from the printers so that he can mail them to you
[806] this P. M. or to-morrow sure. You will see that the work is all
split up, so I don't think it is as good for us if it had been all
let in one bid.

I will do what I can to get prices on the iron, and when you
come up we will make up our mind what to bid on. We ought
to get part of this work anyway.

Let me hear from you when you expect to be here.

Yours very truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "C 2."

McMullen v. Hoffman. Defts. Ex. C2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and Gen-
eral Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, Feby. 8, 1893.

J. McMullen, Esq., 42 Market St., San Fran.

Dear Sir: I herewith send you strain diagrams on file for
the bridges, profiles of the crossings, and details of the and
profile of the bridges. The general plans I cannot get now,
but expect to have them to-morrow, and will then mail them
to you. The engineer has changed his mind on the steel ques-
tion and has concluded to ask for bids on steel also, but iron
will be preferable all things being equal; and instead of hav-
[807] ing one pipe, 33 in. diameter for the submerged pipe, 2 26 in.
pipes will be preferred. I will advise Mr. Catt about this.

Yours truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "D 2."

McMullen v. Hoffman. Defts. Ex. D2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and Gen-
eral Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, Feby. 11, 1893.

J McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir: Have mailed you under separate cover to-day general plans for the three bridges. I did not send these to Mr. Catt as it is like pulling teeth to get prints, as they cannot make them fast enough. I sent him the strain diagrams and I think that will be sufficient for him to get prices on, as I am sure the engineer will not be particular about details after a person gets the contract.

Now, Mac, you are altogether mistaken if you think the O. I. & S. Co. will not bid hard on the entire pipe line; they will be about as low as the wrought iron men, if not lower. The committee will not pay any more for the 24 miles from Mt. Tabor to the head works, for cast iron than they will for wrought iron, and I doubt it very much if they would take cast iron for that part at all. However, the O. I. & S. Co. have a big pull on the committee, and if they get down as low as the wrought iron, they may be able to pull it through. Get the very best prices you can on cast iron. I will try and get prices from the O. I. & S. Co. on pipe, and will then see and have a talk with them and find out what they want. This work will be let to the lowest bidder no matter who is as long as he is responsible. I, of course, think the bids can be manipulated some way that we could work on the commission after they are opened. We are to work on the matter and will have our figures in shape by the time you get here.

I think the parties that get the contract for manufacturing and laying the pipe ought to furnish the iron, still there may not be much money in the furnishing.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2. 1896.

J. A. Sladen, Clerk.

(809)

Defendant's Exhibit "E 2."

McMullen v. Hoffman. Defts. Ex. E 2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and Gen-
eral Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, Mar. 10, 1893.

J. McMullen, Esq., 42 Market St., San Fran., Cal.

Dear Sir: Yours of the 8th inst. just received and contents noted.

I just got contract signed up a few minutes ago. It has been uphill work, but everything is all right now. I am making out Wolff & Zwicker's contract now; they will make the pipe here and pay us the difference in the hauling from Fairview and Portland, which will be about \$6,000; of course we want it to come over the Union Pacific, if possible, as we want many favors from them; however, we are not so very particular about that.

Now, Wolff & Zwicker take it just as we spoke of (\$0.014), ready to transport to the ditch. Wolff will go to San Francisco to get plant to-morrow evening; I think he expects to get most of it from the Risdon folks.

Will send you copies of contracts as soon as I get more time, and also profiles as soon as I can get around to it.

Hope we will be able to buy the Risdon people out, but I think \$15,000 ought to do it, and we would want their prices then, as we could not afford to pay our prices at that.

I note the estimate you sent me; I don't think the committee would have it hand-riveted, anyway Wolff will take it, so that [810] is disposed of.

I don't think we can pull the submerged pipe throughout our bid now. However, we will lay for it and try it the next time. About me having enough pull on the committee to have it readvertised, that is very doubtful. I think we can pool it the next time, as the fellows will have more respect for us, and won't think we are faking.

I will try and find out the bid of the O. I. & S. Co. for laying it. I don't think it was filled in, at least that is the way I understood it.

The bridges went to the Bullen Bridge Co. I think the Pacific and they had an understanding; we worked it all right for them, but Campbell fell down.

I think that we have the best part of the contract, and if we did not make a big mistake in our cost of laying, we will make a lot of money. The Colonel already wants changes, and that is where we get in. Will write you again in a few days.

Yours truly,

LEE HOFFMAN.

D.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[811]

Defendant's Exhibit "F 2."

McMullen v. Hoffman. Defts. Ex. F2. G. A. B., Ex.

Hoffman & Bates. Bridge Builders, Engineers and General Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, March 21, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir: Yours of the 18th inst. at hand. Wolff got back yesterday and says he has made all arrangements for his machinery and expects to be ready to furnish us pipe to lay by June 1st. He seems to be very happy over his contract and thinks he is going to make a lot of money out of it. I am also getting to think he will. I asked him what he paid the Risdon for the plant, but he would not say.

I note what you say about trenching; I don't agree with you on the price we can handle it for, as I am dead sure that we can not take it out of the ditch for 15c, and I still think that a machine might be worked out to do the work with—one that the cost would not exceed \$2,000, but taking it out by hand will be the surest way, and I think we will have no trouble in getting all the men we want.

I think we shall want Foy, although the salary you pay him is large, but if that is the best we can do I suppose we will have to stand it. Will we be required to pay him during the winter months, while we are not working, for there will be about six months that we will not work?

[812] We do not want to start the trenching before we get pipe; in fact, we could not if we wished to, as the pipe line is on the county road and we could not obstruct it.

I will return you the Rochester Specifications & etc. as soon as we get them copied.

Julia E. Hoffman, Executrix, etc.

569

I will make all arrangements for the fittings as soon as I know just what we want.

Mac, we have got an engineer that will burn us up—a religious crank by the name of D. D. Clark. I have done a great deal of work under him, and he is a man that you cannot reason with. He has been with the N. P. R. R. for the last 12 years, and I know him thoroughly. I did not even know that they were thinking of him or I should have talked with some of the committee, but it was too late when I found it out.

Yours truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896.

J. A. Sladen, Clerk.

Defendant's Exhibit "G 2."

McMullen v. Hoffman. Defts. Ex. G2. G. A. B., Ex.

Hoffman & Bates. Bridge Builders, Engineers and General Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, March 27, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

[813] Dear Sir: Yours of the 24th inst. at hand and note what you say about Foy. I think he is the man we want, and hope Lockwood can make such arrangements that will be satisfactory to him and us too.

Mac, I don't think the Risdon and Wolff were in together at all; their actions did not show it, as the time the Capt. and I were out to see the committee he was for us, body and soul, and other things did not go to carry out the spirit of partnership. Mac, in looking over the Risdon's catalogue, we see that the Col. copied their air-valves; now I wish you would get their prices for both 4 and 6 in. valves; our contract calls for 46 4 in. valves with copper air chamber, but he now wishes them changed to 6 in. I would not say anything to the Risdons about the change, but get their prices on both, and I will also get prices on them here. The Risdons know just what they are and ought to give us a good price on them.

Now, I do not think we can handle the material out of the trench for 15 cents, but I think we can do it for less than 20 cents. I think we could sublet it to station men for what Mr. Catt says (15 cents), but I think we had best do the most of it

anyway to protect ourselves, as we have to keep the digging and laying close together and have it under our entire control. Mac, I also wish you would see some of the supply men for water-gates, and see what you can get the 4 gates for, as it seems to me that the price is outrageously high here. We shall want 4 gates, (1 36 in., 1 33 in., and 2 30 in). I don't think we can get a 33 in. gate, so we will have to use 2 26 in. ones; the specifications for same, brass facing, double disk working pressure 150 lbs., and beveled gear laying horizontally. The prices here are about 600 dollars for them; you can tell the parties you ask for prices, that they can have time enough on them to ship by water.

24 in. weighs 3,000 lbs.

48 in. weighs 16,000 lbs.

Yours truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896.

J. A. Sladen, Clerk.

Defendant's Exhibit "H 2."

McMullen v. Hoffman. Defts. Ex. H2. G. A. B., Ex.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, April 3, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir:—Yours of the 27th ult. at hand and note what you say about the bond. You say the contract don't say anything about a bond. W. & Z.'s contract calls for the same in all respects as our contract—same bond in proportion to the work, which they furnished at the time of executing the contract. I would not think of letting a contract unless we were perfectly secured by a bond.

[815] I have not yet heard from Lockwood regarding Foy. Have you heard anything about him? My idea is to keep all the material taken out of the trench on one side as far as possible, and I cannot yet say what I am going to do with the trenching but think it will pay to try station men, but will know more about that later.

W. & Z. say that they will be ready to make us pipe in about six weeks, but if the weather

continues the way it has for the last month, we shall not want any then, as it has rained every day and the roads are all under water, and it will take a long time for them to get into shape so we can haul over them; however, I am in hopes that the rain will let up soon and the roads get in good shape.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "12."

McMullen v. Hoffman. Defts. Ex. 12. G. A. B., Ex.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors. Office, Room 53, Worcester Block.

Portland, Oregon, April 14, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

[816 Dear Sir: I wrote you on March 27th to get prices from the Risdon folks for the 54 air valves both for 4 in. and 6 in. They furnished the Col. the plans and they have the patterns and know just what they are. The Col. wants 6 in. valves, and I want to know the difference in the cost between 4 and 6 in. I wish to know what the Risdon will do, as I want to let the contract for the specials as soon as I can hear from them. You need not bother about the 4 large gates, as I am getting prices from the factory direct, and we have not decided yet just what gates we will use.

We let the contract for the rivets, and I think got low prices on them; we pay for 7-16 in., \$3.45, $\frac{1}{2}$ in. and $\frac{3}{4}$ in. \$3.2 per 100 lbs. at Wilmington, Delaware.

The weather has not improved any yet—raining every day and the roads are just impassable. W. & Z. are getting their shop in shape, and say they will be ready to make pipe as soon as iron arrives.

Have just received letter from Lockwood of which we enclose you copy. Now, what do you think about this? You know more about Foy than I do—I myself think it is a large salary for the work we have to do; however, if you think it will

May us to take him, please let us know. Will await your answer before I reply to Lockwood.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[817]

Defendant's Exhibit "J 2."

McMullen v. Hoffman. Defts. Ex. J2. G. A. B., Ex.
Hoffman & Bates, Bridge Builders, Engineers and General
Contractors. Office: Room 53, Worcester Block.

Portland, Oregon, April 20, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir: Yours of the 11th inst., with enclosed lists and prices from the Risdon, were received a few days ago, and also yours of the 18th just at hand. Now, Mac, I want to tell you right at the start that the Risdon take us for suckers, and I don't propose to be taken in by them. I don't know anything about what the tools will cost, but I do know something about specials; the idea of them asking us \$25 for 4 in. air valves and \$21 for manholes, and other things in proportion.

Now, Mac, I don't want any of the Risdon in mine; they may know all about pipe line and we know nothing, but I will take my chances. Wolff & Zwicker are now figuring on what tools we require and we shall in all probability get them here. As I said, I will let you know later about tools; I understand that we require a good outfit to do this work, and don't apprehend any trouble at all in getting it, as there is very little work going on now and plenty of good men. Now, my idea is, not to employ a single boilermaker on the work; I want to keep clear of them if possible. I want to use all bridge men to do the riveting; they will probably not drive as many rivets at first as a boilermaker, but we will have them under our control. You must have some good iron bridge men, and with what we have, think we can get along. We may have to have some boilermakers to do the caulking, but I hope to do that without them. I want absolutely nothing to do with them if I can help it.

[818]

About your Mr. Wood, I think he would be a good man on this work, but have concluded to put Bush in the field, as he has had quite a large experience with the Jersey Works. I

think he is the best man for the place we can get; after thinking the matter over I have come to the conclusion that Foy would probably be the best man we could get, and I think it would be a good idea for you to ask him, and be ready to report about June 1st; that is as soon as we can get started. I think Foy would be a good man to have general charge over all the foremen and everything connected with the work.

Let me know about what you think of doing our riveting with bridge men and how many you can send us that have had experience in that line; I also expect them to do the caulking. We may not get along as fast at first, but I think we will be ahead in the end.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "K 2."

[819] McMullen v. Hoffman. Defts. Ex. K2. G. A. B., Ex.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, May 1, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir:—Yours of April 22d I received in due time, but I thought I would be in San Francisco to-day so did not write; things changed so that I could not very well get away, and I had to put off my trip for the present.

Regarding the riveting men from the east, I wrote to Catt to send some out if he could get them, and also sent him a copy of your letter. I also told him to get one hydraulic field punch and shears and send them. I will get a lever punch and shears made here, and if the hydraulic will do the work we expect it to, we will order another set.

I think we can get along without any boilermakers at all; in fact, I have no doubt we can pick up men on this coast that will do us very well; still, if Catt can secure a few good men I would like it.

I enclose you a catalogue of the Cumming Portable Forges; we want the ones on page 2; please get about 12 of these and have them here about June 1st; the price list has them \$35.00,

but we ought to get a good discount. This is a very high priced forge, but every one who has used them tell me it is the very best.

[820] The rain still keeps on and no telling when it will let up. I am afraid the roads will be in such shape that we will not be able to haul even if we are ready June 1st. I went after W. & Z. the other day; I am satisfied they will not have their machinery in shape to run by the time agreed upon. They say they are rushing the Risdon all they possibly can. I told them that you wrote me that the machinery would not leave San Francisco before the 1st of June, so they may go after you. I only did it to stir them up. We have not yet got plans for manholes and blowoffs. The Col. is undecided and changing from one thing to another, but I hope to have him decide on a certain plan within a day or two.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "L 2." |

McMullen v. Hoffman. Defts. Ex. L2. G. A. B. Ex.
Hoffman & Bates. Bridge Builders, Engineers and General
Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, June 9, 1893.
J. McMullen, Esq., 42 Market St., San Francisco, Cal.

[821] Dear Sir:—Yours of the 6th inst. at hand and contents noted. We received the forges sometime ago. but so far have had no use for them. Wolff & Z. have not started their shop and I don't know how soon they will be able to start. They promised to give us pipe in a week, but I hardly think they will—not very much any way.

Foy is out on the work getting his camp started but he will not be able to do much until we get some pipe to lay. I don't know what we will do about the caulking, but hardly think it would pay us to have a machine; however. I will let you know about this later.

I don't think we want any foreman, at least no trenchers; we may want a pipe foreman later.: What we want most is

riveters and caulkers. I will enclose you a scale of the wages that we propose to pay, and if any of the "Risdon" pipe men want to come on this layout, we would be glad to have them, but I think their men want \$3.50 per day and board for 9 hours' work and I am not going to pay it.

About money matters: I do not care to borrow any money, as I have my money all provided for; any way, I doubt very much if we could raise any money on notes until the scare blows over a little. I think it will require about \$20,000 to carry this work along.

I have orderd most all the specials, and of course we will have to pay for them when they arrive. We will have to buy some teams and other plant, and I estimate it will take about the above amount. As soon as the work gets started I will let you know.

Yours truly,
LEE HOFFMAN.

[822] Rate of wages to be paid employees on the Bull Run pipe line, in the service of Hoffman & Bates, Contractors:

Boilermakers	\$0.35 per hour.
Riveters	0.30 per hour.
Holders	0.25 per hour.
Rivet-heaters	0.20 per hour.
Laborers	0.20 per hour.
Board	\$5.00 per week.

To J. McMullen, Esq., June 9, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "M 2."

McMullen v. Hoffman. Defts. Ex. M2. G. A. B., Ex.

Hoffman & Bates. Bridge Builders, Engineers and General Contractors. Office 53 Worcester Block.

Portland, Oregon, June 20, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir:—Yours of the 15th inst. I received a few days ago. We have not started the pipe laying yet—expect to get started by Monday if the weather is so that we can haul. We left the shop this morning with five loads, but I don't know when they will get out to the place. Foy was in last night and says

823] that he is getting started all right with the ditch, although it is very muddy and the ground soft. I expect to go out in the morning and see how the work is getting along. Wolff & Z. are doing fairly well; they are now turning out about 400 ft. of pipe per day, and by the 1st of the month expect to turn out 600 ft. each day.

About money matters: You don't seem to think it will take \$20,000 to carry this work; I do, as we have to pay for our rivets, gates, valves, & etc., as they arrive, and get payment as they are put in place; of course, I am not going to pay out any more money than I can help. It is out of the question to raise any money up here from the banks at present. However, I am in hopes the scare will soon let up and the banks will let out money again.

I will see Foy and ask him if he wants to buy any more teams and let you know. We have bought some stock besides what we got from you at Seattle, and I don't think we shall want any more for a while, at least until we get started.

Mac, I wish you would step into the Palace Hotel and ask the clerk if they got the pipe Mrs. Hoffman left in her room. She bought me a fine pipe and left it on the mantel there. I don't suppose there is much show of getting it, but they may give it up.

Mrs. Hoffman got back all right and says she had a splendid trip.

Will write you again after my return from the work.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.
Letter of July 31, '93, gone—not on file.

824]

Defendant's Exhibit "N 2."

McMullen v. Hoffman. Defts. Ex. N-2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and General
Contractors. 657 & 658 Worcester Block.

Portland, Oregon, July 14th, 1893.
J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir:—Yours of the 6th inst at hand. I have just returned from a trip over the pipe line; things are not going very well yet; we have about 1 mile of pipe in the ditch; but

not yet riveted up, as there is something the matter with our rivets; 5 per cent of the heads drop off, and the Supt. has stopped us from going ahead several times, but we are still going ahead trying them, as we think it is possible the fault of the men driving them. I wired to George W. Gibbs for some others, but he has not got them, so have wired to Chicago for rivets, but it will take at least 30 days to get them here, and I don't know what we will do during this time. I don't know if they will let us go on with what we have got and take out the poor ones or stop us altogether. We cannot afford to go on with the ones we have here now.

[825] The trenching is just "Lightning"; after we get down about 3 feet we strike a clay hard-pan, that is just as hard as it can be; we have from 8 to 10 horses on the plow and it wears them right out. Foy is talking of taking an engine out to plow with, and I think we will have to do it. We have about 4 miles of the trench opened and it is costing a great deal more than we get for it; from what I can see now, it costs us at least 50 cents per yard to take that hard material out of the trench. We have about a mile of pipe in the trench and about $\frac{1}{2}$ of it riveted up, and that part of the work would come out all right if we had good rivets.

Now, Mac, I have put in this work just \$10,000 outside of my tools and outfit, and by the 1st month we will have to pay our pay-rolls, rivet and other bills, all told amounting to at least 4 or 5 thousand dollars. We have now on the way trestles and valves, iron for bends, & etc., which will all have to be paid before we get another estimate.

We have got an estimate of \$5,000, all told, for pipe laid and trenching; of this amt. \$1,900 for trenching. By the time we pay W. & Z. and the hauling, we will only have \$3,500 to pay bills with.

Now, Mac, I don't feel like carrying this work alone and as far as borrowing money here on my note, I don't think it could be done; in fact, you cannot borrow here at all. I am in the same boat you are in I have got money coming to me but cannot get it. I am not finding any fault with your part of the work of getting the contract, but you must understand that we did some work and have been working hard ever since, and am willing to do my part, but cannot afford to do it all; therefore, I must ask you to put in your half of what it takes to run

[826] this work. I have started a separate bank account, Hoffman & Bates and I put in \$10,000, and I have not changed my mind as to the amount it will take to carry this work (\$20,000) on in good shape, and I still think we are going to make good money out of this contract, but it requires a great deal of watching. We give by far the best part of our contract to W. & Z. They are coining money as far as I can see.

Foy, I like him; he has had a large experience in organizing forces, and think he is doing very well; of course he don't know anything about laying pipe, but think he will do all right. Bush is out there looking after the pipe riveting.

July 17th.

Since writing the above I have been out on the line again and the rivets are not getting any better. I have now ordered another carload from Chicago (Norway) iron to see what they will do. I made a big kick on classification on the hard material; it went before the construction committee, but got set down on hard. The material is still getting harder and I am doing all the kicking I can but can do nothing with the committee. Col. Smith is all right, but he won't take any responsibility upon himself. If we could get this material out of the trench at any reasonable cost everything would come out all right, as the pipe goes in the ditch in good shape.

Yours truly,
LEE HOFFMAN.

[Endorsed]: (In pencil.)

24,000 ton No. 2 Est. 60 cts.

[827] 45,600 ton No. 1 Est. \$1.00.

2 ton to the C. F. Hinkles.

Solid yard 12 ft. to to

Fishers Quarry, Columbia River.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "O 2."

McMullen v. Hoffman. Defts. Ex. O2. G. A. B., Ex.
Hoffman & Bates, Bridge Builders, Engineers, and General
Contractors. 657 & 658 Worcester Block.

To J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Portland, Oregon, July 20, 1893.

Dear Sir:—We would like to know just what salary arrangements you made with Hugh Foy, as you did not state anything

about salary to him in your letter of May 12th of which you sent us a copy. We understood that we were to pay him \$250 per month, but do not know whether this is to include his private expenses or not. We desire to know your full arrangements in order to act intelligently in this matter.

Yours truly,

HOFFMAN & BATES,

Per Lee Hoffman.

[828] [Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

For Ex. P2. see printer's record, page

Defendant's Exhibit "Q2."

McMullen v. Hoffman. Deft. Ex. Q2. G. A. B., Ex.

Hoffman & Bates, Bridge Builders, Engineers, and General Contractors. 657 & 658 Worcester Block, Portland, Oregon.

Portland, Sept. 11th, 1893.

J. McMullen, Esq., San Francisco.

Dear Sir:—The waterworks contract is very much mixed up. Last Thursday the committee held a meeting and called me in and there told me they had no money to pay me on the 20th of this month, and told me they did not know if they could sell any bonds at all or not, and I could keep on or stop just as I choosed to do. I insisted that it was for them to say if I should go ahead or not, as they had a right to stop the contract, but I did not, as it would involve me with my sub-contractors, but they would not tell me to stop, so I had to keep on. Our estimate is \$66,000.00, and they have \$40,000.00 that they are going to divide equally among all the contractors, so we will get about \$20,000, and after paying Wolff & Zwicker and Cook and Kiernan their pro ratio, we will have about \$9,000.00 left to pay about a \$22,500 payroll, station men included, besides iron gates and supplies besides this month.

[829] Now, Mac, I am compelled to insist that you raise your portion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money or let go of the contract, as you agreed to do. I have held off as long as I could with the hopes that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of hard luck you are in

but you can see the necessity of having money. If you will furnish \$10,000 by the 20th. I will carry on the contract the same way I did before, but this amt. I must insist on your furnishing or you must let go, and I will get some one in that will furnish part of the money. I still think we will make some money. We are not going to make very much, but we will make some if we don't have too many leaks after we get the water turned on. Now, Mac, I don't want you to think that I want to take advantage of you, because I don't, and if it was you that was doing this work and I could not do my share I would not ask you to do for me. If I could do this alone I would, but I absolutely can't do it. Please let me hear from you at once, as I must do something with this work before pay day.

Yours very truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

830]

Defendant's Exhibit "R 2."

McMullen v. Hoffman. Defts. Ex. R2. G. A. B., Ex.
Hoffman & Bates, Bridge Builders, Engineers, and General
Contractors. 657 & 658 Worcester Block, Portland, Oregon.
Portland, Sept. 16th, 1893.

J. McMullen, Esq., San Francisco.

Dear Sir:—Yours of the 14th at hand and contents noted. Now, Mac, there is no use for you to tell me how to do business. I have done business here for a number of years to suit me and shall keep on if possible. It is all very well to tell me what to do if you are in S. F., but I am here and know just what is wanted. Now, I want to tell you once for all that unless you put up your share of the money, namely, \$10,000, by the 20th of this month, I shall not recognize you in this contract after that date and shall make such arrangements as I see fit. If the San Francisco Br. Co. has got the credit you claim it has, and I have no doubt but what it has just got what you say it has, San Francisco is the place for them to raise money to carry on their portion of this work. You seem to raise money enough to carry on the Spokane and Yakima work, but you can do nothing for this. Now, there is no use of our talking this matter over any further. I have told you what I want

[831] you to do. If you want to take this work and run it, you can do so. I will put up my portion of the money. But I draw the line on that. Hoping to get your share of the money by the time specified. I am

Yours very truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "S 2."

Steel Conduit from Head Works to Mt. Tabor.

Proposals for Manufacture and Laying.

Address, see Article 9
of Specifications.

Portland, Oregon, March 1st, 1893.

Frank T. Dodge, Clerk of the City Water Committee, of the
City of Portland, Oregon:

The undersigned, Hoffman & Bates, of 53 Worcester Block, Portland, Oregon, propose to furnish all labor and materials necessary to complete the work described in the specifications for the water supply of the city of Portland under the head of steel "conduit from head works to Mount Tabor" as "manufacture and laying," at the prices stated below:

[832]	Steel, 11,442,000 lbs.			
	Rivets, 340,000 lbs., 11,782,000 lbs. at..\$.0275	\$	\$324,005 00	
	Manholes, 225, at. 20.00	4,500.00	4,500.00	
	Air Valves, 54, at. 8.00	432.00	432.00	
	Bends—extra joints, 200, at. 30.00	6,000.00	6,000.00	
	Blow-offs, with 6-inch valves, 46, at.... \$20.00	\$ 920.00		
	Waste Pipes, 6-inch steel, 29,000 lbs., at 10	2,900.00	3,820.00	
	Bricks laid in cement	\$		
	Two Stand Pipes, 580,000, at. 21.00	.....	12,180.00	
	Steel Plates, 15,000 lbs., at. .... .08	1,200.00		
	Water Valves, 36-inch, 1, at. 500.00	500.00		
	Water Valves, 33-inch, 1, at. 500.00	500.00		
	Water Valves, 30-inch, 2, at. 350.00	700.00		
	Waste Pipes, 30-in. steel, 40,000 lbs., at .07	2,800.00		
	Foundations, concrete or masonry, 60 cubic yards, at. 10.00	600.00	6,300.00	

Sleeve Joints—

Wrought Iron Sleeves, 7,000 lbs., at \$.07	490.00	
Lead, 3,000 lbs., at..... .06	180.00	670.00

Trestles—

Wrought Iron, 40,000 lbs., at.....\$.064	\$2,560.00	
Foundations, concrete, 400 cubic yards, at..... 8.00	3,200.00	5,760.00

Excavation and Refilling—

Earth, 270,000 cubic yards, at..... .30	81,000.00	
Loose Rock, 10,000 cubic yards, at. 1.50	15,000.00	
Solid Rock, 2,000 cubic yards, at... 3.00	6,000.00	102,000.0

Total, manufacture and laying (See Art.

7 of Specifications).....	\$465,722.0
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833] We enclose herewith a certified check for \$23,300.00, being five per cent of the amount of the proposal, to be forfeited in accordance with the provisions of Art. II of the specifications in case that we should fail to furnish the required bonds and execute the contract if awarded to us within twelve days after the award.

Signature,

See Art. 9. Specifications.

HOFFMAN & BATES,
Per Lee Hoffman.

Steel furnished by the water committee. (See Articles 86 and 88.)

[Endorsed]: McMullen v. Hoffman, Defts. Ex. S2, G. A. B., Ex.

A true copy substituted by agreement in lieu of the original.
Filed Mar. 2. 1896. J. A. Sladen, Clerk.

GEO. A. BRODIE,
Examiner.

Defendant's Exhibit "T 2."

Steel Conduits from Head Works to Mt. Tabor.

Proposals for Manufacture and Laying.

Address, see Article 9

of Specifications. (5)

San Francisco, Cala., March 1, 1893.

Frank T. Dodge, Clerk of the Water Committee of the City of
Portland, Oregon:

[884] The undersigned San Francisco Bridge Co., of San Francisco, Cala., propose to furnish all labor and materials necessary to complete the works described in the specifications for the water supply of the City of Portland, under the head of "Manufacture and Laying (C)," at the prices stated below:

Iron, 11,442,000 lbs.			
Rivets, 342,000 lbs., 11,784,000 lbs. at \$.031	\$365,304.00		
Manholes, 225, at 20.00	4,500.00		
Air Valves, 4-inch, 54, at 10.00	540.00		
Bends, extra joints, 200, at 25.00	5,000.00		
Blow-offs, with 6-inch valves, 46, at 20.00	920.00		
Waste Pipes, 6-inch, No. 14 iron			
Wrought Iron, 15,000 lbs., at .05	1,450.00	\$377,714.00	
<hr/>			
Bricks laid in cement, 580,000 lbs., at 20.00	\$11,600.00	11,600.00	
Two Stand Pipes.			
Wrought Iron, 15,000 lbs., at .05	750.00		
Water Gates, 36-inch, 1, at 250.00	250.00		
Water Gates, 33-inch, 1, at 250.00	250.00		
Water Gates, 30-inch, 2, at 250.00	500.00		
Waste Pipes, 30-inch, 40,000 lbs., at .05	2,000.00		
Foundations, concrete or masonry, 60			
cubic yards, at 10.00	600.00	4,350.00	
<hr/>			
Sleeve Joints—			
Wrt. Iron Sleeves, 7,000 lbs., at .05	350.00		
Lead, 3,000 lbs., at .05	150.00	500.00	
<hr/>			

Trestles—

Wrought Iron, 40,000 lbs., at ...	.06½	\$2,600.00	
Foundations, concrete, 400 cubic yards, at	6.00	2,400.00	5,000.00

Excavation and Refilling—

[835]

Earth, 270,000 cubic yards, at ...	.35	94,500.00	
Loose Rock, 10,000 cubic yards, at	1.50	15,000.00	
Solid Rock, 2,000 cubic yards, at	3.00	6,000.00	115,500.00

Bid C (See Art. 7 of Specifications)—

Total			\$514,684.00
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We enclose herewith a certified check for \$27,300.00, being five per cent of the amount of the proposal, to be forfeited in accordance with the provisions of Art. II of the Specifications in case that we should fail to furnish the required bonds and execute the contract, if awarded to us, within twelve days after the award.

Signature

SAN FRANCISCO BRIDGE CO.,

By J. McMullen, Prest.

See Art. 9. Specifications.

Wrought iron furnished by Water Committee. (See articles 86 and 88.)

[Endorsed]: McMullen v. Hoffman. Defts. Ex. T2., G. A. B., Ex.

A true copy substituted by agreement in lieu of the original.
GEO. A. BRODIE.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "U 2."**BULL RUN CONTRACTS.**

Copies of Estimates, March 15th, '93.

Hoffman & Bates, Room 53, Worcester Block, Portland, Oregon.

Bid "A"—Head Works.

PORTLAND WATER WORKS.

Ex. U 2

	RATES		Cost	Bid	Total Cost	Profit	Bid
	Cost	\$					
Clearing and grubbing 2 acres, at.....	\$125						
Trees cut—100 trees.....	3				550	55	605
Excavations:							
Earth—3,000 cubic yards, at.....	.50				1,500		
Loose rock—1,000 cubic yards, at.....	1.50				1,500		
Solid rock—7,000 cubic yards, at.....	1.50				10,500		
Rock under water—100 cubic yards, at.....	10.00				1,000	1,450	15,950
					15,050	1,505	16,555

Bid "A" [See Act. No. 7 Spec.] certified check No. 850 to 1200.

Bid "B"—for Wrought Iron:

Wrought iron, 11,442,000 lbs., F. O. B. Mill, at.....	\$	.02			\$228,840		
Freight on ".....		.0107			122,429		
Inspection, insurance and inc., at.....					731		
					3.38		

Bid "B" [See. Act. No. 7 Specif.] certified check \$19,500 to \$22,000.

Bid "C"—Manufacturing and Laying:

Receipt and storage 11,442,000 lbs. at.....	\$	.0005			\$	5,721		
Insurance, rejections, inc. at.....		.0005				5,721		
Plant, assumed cost for 25 lengths per day, at.....		.0025				28,605		
Pay-roll—punch, bend, riv. and caulk, at.....		.00375				42,908		
Fuel, Oil—supplies, at.....		.0005				5,721		
Dipping, 2 coats—material, at.....		.002				22,884		
labor, at.....		.0005				5,721		
Testing (25 lengths per day), at.....		.00125				14,303		
Transportation to trench, at.....		.03				34,326		
Laying and riveting, at.....		.0025				28,605		
Total iron, 1,144,800 lbs., fin. on ditch, per lb.....		1.70				194,515	19,450	213,965

837]

Rivets, 342,000 lbs., at per lb.	\$ 3.9	\$	\$ 13,338	\$ 13,338	\$ 1,334	\$ 14,672
Manholes, 225, at each	20	.....	4,500	4,500	450	4,950
Air valves (4 inches), 54, at each	10	.....	540	540	54	594
Bands, extra joints 200, at each	30	.....	6,000	6,000	600	6,600
Blow-offs (with 6-inch valves), 46, at each	10	.....	400	400	.....	.....
Waste pipes, 23,000 lbs. (labor only), at per lb	.02	.....	580	580	.....	.....
Waste pipes, 580 lbs., brick in cem., per lb.	16	.....	9,280	10,320	1,032	11,352
Two-stand pipes, labor on 15,000 lbs., at	\$.02	\$	300	300	.....	.....
Four gates, at each	.160	.....	600	600	.....	.....
Labor on 40,000 lbs., at per lb	.02	.....	800	800	.....	.....
Concrete, 60 yds., at	10	.....	600	2,300	230	2,530
Sleeve joints—7,000 lbs. wrought iron, at per lb	.06	.....	420	.....	.....	.....
3,000 lbs. lead, at per lb	.06	.....	180	600	60	680
Trestles (all cast) of 40,000 lbs. wrought iron, at per lb	.06	.....	2,400	.....	.....	.....
400 yds. concrete, at per yd	10	.....	4,000	6,400	640	7,040
Total for all but excavating and refilling	\$ 2.085	\$2,293	\$238,513	\$238,513	\$23,850	\$262,363

V 2

PORTLAND WATER WORKS.

gid "C" (continued.—Mfg. and Laying.

	RATES		Cost	Bid	Cost	Total Cost	Profit	Bid
	\$	\$						
Br. forward [all est. but Excav. Refill]								
Excav. and Refilling				.33	81,000			
Earth, 270,000 yards, at			.30	1.65	16,000			
Loose Rock, 10,000 yards, at			1.50	2.20	4,000			
Solid Rock, 2,000 yards, at			2.00		100,000	100,000	110,000	
					338,513	33,850		372,363
Total bid "C" [see act No. 7 spec.]			2.958	3.255				\$
Certified check \$19,000 to \$22,000								
Bid "E"—Cast I. Mt. Labor to City Park.								
Cast Pipe—6,300 [short] tons at Fon. East.			21.50		135,458			
6,300 [short] tons Ins. and Frt.			8.50		53,550			
6,300 [short] tons, local handlings						189,000	18,900	207,900
Laying and etc., 6,300 [short] tons (pointing)			10.00		63,000	63,000	6,300	69,300
Manholes, 15, 30,000 lbs., at			.04		1,200	1,200	120	1,320
Blowoffs, 6 blowoffs, 1,200 lbs., at			.04		480			
6 W. I. wastes, 1,900 lbs., at			.06		780		301	2,211
6 Water valves, 5 at			150.00		750	2,010	10	110
Air valves [4 inches] 10 at			10.00		100	800	80	880
Bends—Cast iron, 20,000 lbs., at			.04					
Excav. and refilling								
Earth, 40,000 yards, at			.30	.33	12,000	12,000	1,200	13,200
Loose rock, 4,000 yards, at			1.50		6,000	6,000	600	6,600
Solid rock, 1,000 yards, at			2.00	2.20	2,000	2,000	200	2,200
Excav. Solid, per ton			43.82	48.20		276,110	27,611	303,721
Bid "E" [see Act. No. 7, spec.]								
Certified check 15,500 to 17,000								

Defendant's Exhibit "W 2."

[840]

Bull Run.

Copy of Catt's Estimate on Plant

For 20 sections 30 ft. long—120 sheets per day.

4 punches	8,000
2 Planers	3,000
2 Bending Rolls (each bend 6 plates per hour)	3,000
12 Yale and Towne Cranes	3,000
3 Riveters complete with Pumps, cranes, etc. (to run night and day)	16,000
2 Forges	100
1 Small Punch and Shear	1,500
1 Drill Press	200
1 Lathe	200
Shafting	1,000
Car Track and Overhead Tramway	1,200
Engine	2,000
Boilers	3,000
Electric Light	1,000
Incidentals	1,000
	<hr/>
	44,200
Transportation to Portland	5,000
Dipping plant	3,000
Hoisting Engine for same	5,000
Shop Buildings	10,000
	<hr/>
	67,200

[841] N. B. This estimate includes nothing for setting up machinery, preparing foundations for same, etc. The estimate for shop building is, however, too high, about high enough to cover this. The estimate for riveters is too high, as these riveters are designed to drive $\frac{3}{4}$ in. and 1 in. steel rivets and special riveters for this work (7-16 in. and $\frac{1}{2}$ in iron rivets) can be made for one-half cost of above.

H. D. B.

Bull Run.

W.2 p.2

Catt's Estimate of Cost of Riveted Pipe, 20 sections
—about 50,000 lbs. per day.

	Per day
Total men to operate tools, to deliver the pipe ready for calking, 60 @ \$2.50 per day average	150.00
Coal and Oil	25.00
Rivets for 50,000 lbs. plates—excess of	
Cost of rivets over price paid for finished pipe	60.00
Engineer and fireman	15.00
Shops, Superintendents and Supplies per day	50.00
Making a total per day of	300.00
	per pound
\$300 per day for 50,000 lbs.—per pound for pipe ready for calking .....	.006
Calking .....	.0005
Dipping and Testing .....	.0015
Contribution toward cost of plant	\$36000.00 .003
[842] Superintendence and incidentals	\$18000.00 .0045
Making a total of .....	.0125
Riveting on field .....	.002
Hauling .....	.0025
Profits	\$80500.00 .007
Or bid for pipe in the ditch .....	.024
We did bid .....	.0275
N. B. 50,000 lbs. per day would be about 600 tons per month, requiring 10 months to manufacture pipe. Catt has \$50 per day for superintendence and incidentals in one place 250 days @ 50	12500
For the same in another place	18000

30,500

But he is too low on field work, allowing only 2/10c. or \$4.00
per ton for *all* the work in the field.

Reduced to tons his estimate is as follows:

Shop Work—1 1-4c. per lb.	\$25.00 per ton
Hauling 1-4c. per lb.	5.00 “ “
Field Work 2-10c. per. lb.	4.00 “ “
	<hr/>
	\$34.00 “ “

Julia E. Hoffman, Executrix, etc.

591

Profit 7-10c. per lb. 14.00 " "

Bid \$48.00 " "

We bid \$55.00.

H. D. B.

[843]

Bull Run Pipe Line. W2, page 3

Copy of Catt's Estimate for Manufacture and Laying.

As compared with actual bid.

	Catt's Prices	Estimate Amounts	Prices Bid.	Bid. Amounts
Plates 11442000 lbs.				
Rivets 340000				005
Manuf. and laying 11782000				
lbs. @	\$.024	\$282768.00	.0275	324060
Manholes 255 @	30.000	7560.00	\$20.	4500
Air Valves 34 @	10.000	340.00	8.	432
Bends, Extra Joints, 200 @	20.000	4000.00	30.	6000
Blow-offs with 6" valves 46	10.000	460.00	20.	920
Waste Pipes 6" 29,000 lbs.	.060	1740.00	.10	2900
Brick laid in cement 580 M	16.00	9280.00	21.	12180

Two Stand Pipes.

Plates	15,000 lbs.	.060	900.00	.08	1200
Water Gates 36"	1	75.000	75.00	500.	500
Water Gates 33"	1	75.000	75.00	500.	500
Water Gates 30"	2	75.000	150.00	350.	700
Waste Pipe 30"	40000 lbs.	.060	2400.00	.07	2800
Foundat'n Concrete	60 yds.	12.000	720.00	10.	600

Sleeve Joints.

Wr't Iron—7	7000 lbs.	.100	700.00	.07	490
[844] Lead	3000 lbs.	.060	180.00	.06	180

Trestles.

W'r't Iron.....	40000 lbs.	.060..	2400.00	.064	2560
Concrete	400 yds.	12.00	4800.00	8.	3200

Total without Excavation.....	318638.00				363722
					667

Excavation and Refilling.

Earth.....	270000 yds.	.33 1-3	90000.00	.30	81000
Loose Rock ...	10000 yds.	.500 ..	5000.00	1.50	15000
Solid Rock. ...	2000 yds.	1.200 ..	2400.00	3.00	6000

	97400.00				102000
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Grand Total.....	\$416038.00				465722
					667

Defendant's Exhibit "Y 2."

[45]

BID "D.D.D."

G.A.B. Ex.

Manufacturing and Laying.

28	{Steel, 11,442,000 }	11,782,000	\$.024	\$282,768.00	
	{Rivets 340,000}				
29	Manholes.....	255	30.00	7,650.00	
30	Air Valves.....	34	10.00	340.00	
31	Bends, extra joints..	200	20.00	4,000.00	
32	Blow-offs, with 6-inch valves.....	46	10.00	460.00	
33	Waste Pipes, 6-inch.	29,000	.06	1,740.00	
33 1/2	Brick laid in cement	580,000	16.00	9,280.00	\$306,238.00
34	Steel Plates.....	15,000	.06	900.00	
35	Water Valves, 36-in.	1	75.00	75.00	
36	Water Valves, 33-in.	1	75.00	75.00	
37	Water Valves, 30-in.	2	75.00	150.00	
38	Waste Pipe, 30-in...	40,000	.06	2,400.00	

Julia E. Hoffman, Executrix, etc.

39 Foundations—

	Concrete or cement	.80	12.00	720.00	4,320.00
40	Wrt. iron sleeves...	7,000	.10	700.00	
41	Lead.....	3,000	.06	180.00	880.00
42	Wrought iron.....	40,000	.06	2,400.00	
43	Foundat'ns, concrete	400	12.00	4,800.00	7,200.00
44	Earth.....	270,000	.33½	90,000.00	
45	Loose Rock.....	10,000	.50	5,000.00	
46	Solid Rock.....	2,000	1.20	2,400.00	97,400.00
Total cost Bid "D.D.D."					\$416,038.00

Clerk's Certificate to Transcript.

[846]

District of Oregon, ss.

I, J. A. Sladen, clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in cause No. 2204, John McMullen v. Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, the said transcript comprising volume one, containing the pleadings and depositions, volume two, containing the testimony taken before George A. Brodie, examiner, and volume three containing exhibits to the said testimony is a correct transcript of the said record and of the whole thereof, except the parts of the said record which are omitted by stipulation of the parties to this cause, as the same appears at my office and in my custody.

I further certify that the cost of the foregoing transcript, on the appeal of Julia E. Hoffman, executrix, is three hundred and ten and 50-100 dollars, and that the same has been paid by said appellant; and the cost of the transcript on the appeal of John McMullen is nine and 20-100 dollars, and that the same has been paid by said John McMullen, appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court at Portland, in said District, this 9th day of October, 1896.

[Seal]

J. A. SLADEN,
Clerk.

7] [Endorsed]: No. 334. In the United States Circuit Court of Appeals for the Ninth Circuit. Julia E. Hoffman, Executrix of the Last Will of Lee Hoffman, Deceased, Appellant, vs. John McMullen. John McMullen, Appellant, vs. Julia E. Hoffman, Executrix of the Last Will of Lee Hoffman, Deceased. Transcript of Record. Appeal from the Circuit Court of the United States for the District of Oregon.

Filed October 14, 1896.

F. D. MONCKTON,
Clerk.

[848] *In the United States Circuit Court of Appeals, for the Ninth Circuit.*

JULIA E. HOFFMAN, Executrix of the
Last Will of Lee Hoffman, Deceased,
Appellant,
vs.
JOHN McMULLEN,
Appellee.

Opinion.

Appeal from the Circuit Court of the United States for the District of Oregon.

Dolph, Mallory & Simon, for appellant.

Cox, Cotton, Teal & Minor and I. Percy Wright, for appellee

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity brought by John McMullen (plaintiff) against Lee Hoffman (defendant) for an accounting for the profits earned on a contract to construct a pipe line by which the city of Portland is supplied with water. Pending the suit, Lee Hoffman died, and the suit was revived against Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased. The water committee representing the city of Portland having advertised for bids to construct the line, the original parties hereto entered into an agreement by which the defendant, Hoffman, bid for the work, in the name of Hoffman & Bates. The plaintiff, McMullen, with the knowledge and concurrence of the defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some \$49,000 higher than the bid of the defendant. The contract having been awarded to the defendant, a written agreement of partnership was entered into by the parties for the

49] execution of the contract to be entered into by the defendant with the city, which agreement reads as follows:

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That whereas, said Hoffman and Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman & Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expense of executing the same, and each to receive one-half of the profits, or bear and pay one-half of the losses, which shall result therefrom. And it is further hereby agreed that, if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

The contract awarded on defendant's bid was formally entered into by the water committee, of the one part, and by the defendant, in the name of Hoffman & Bates, of the other. The contract proved a profitable one, the profits thereunder amounting to nearly \$140,000. Hoffman refused to account to McMullen for any part of these profits, upon the ground that the bids made by them tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and could not be enforced in equity, and upon the further ground that McMullen wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement, to share the earnings of the contract with the complainant, was made.

The whole transaction grows out of the enterprise undertaken by the city of Portland to conduct the water of Bull Run river some 30 miles to the city. The water was to be conveyed through steel pipes, and had to be conducted across streams

which required the construction of bridges, and expensive and permanent works had to be erected at Bull Run river, where the water was diverted from the river to the pipe. The construction of this work was placed by the legislature in the hands of a committee composed of 15 persons, who managed the business for the city. This committee decided to let this work at a public letting to the lowest bidder, and to that end the work was divided into the following general classes: (1) Head works; (2) bridges; (3) wrought-iron plates; (4) steel; (5) manufacturing and laying wrought-iron or steel pipes from head works to Mt. Tabor; (6) steel plates for pipe; (7) conduits from head works to Mt. Tabor, cast iron; (8) cast-iron pipe for Mt. Tabor City Park; (9) submerged pipes,—and separate bids invited for each. The letting was the ordinary public letting upon sealed proposals. Hoffman and McMullen each undertook to secure contracts to do this work, or some portion of it, by bidding for it, in response to the invitation of the water committee. Bids for each of the following items were accordingly submitted by them to the water committee, Hoffman bidding in the name of Hoffman & Bates, and McMullen bidding in the name of the San Francisco Bridge Company: Head works: Hoffman & Bates, \$17,800; San Francisco Bridge Company, \$16,550. Bridges: Hoffman & Bates, \$33,562.94; San Francisco Bridge Company, \$31,993. Steel conduit from head works to Mt. Tabor: Hoffman & Bates, \$359,278; San Francisco Bridge Company, \$348,781. Conduit from head works to Mt. Tabor of steel or wrought iron, making and laying pipe: Hoffman & Bates, \$465,722; San Francisco Bridge Company, \$514,775. McMullen submitted a bid in the name of the San Francisco Bridge Company for the submerged pipe of \$79,740. For this work Hoffman did not bid. They agreed in advance upon what parts of the work they should bid, upon what their respective bids should be, and upon what portion the bid of the San Francisco Bridge Company should be cheapest. There was also an understanding between them, as to some portions of the work, that the lowest bid should be withdrawn in the event that there were no other outside bids lower than Hoffman & Bates. In other words, they were to pool their bids, and so arrange matters that the highest bid, as between themselves, should, if possible, be accepted, and they would divide the proceeds of the contract. Suggestions were freely made

[852] as to the propriety of taking in other bidders, and also the secretary of the committee, so that honest bids might be withheld and others ascertained, by fraudulent and improper means. The following extract from a letter written by McMullen to Hoffman fairly illustrates the means they proposed to use to accomplish the object they had in view:

"I do not want to let go on that submerged pipe; want to get the job. I think we can make \$25,000 on that job, but we must pool it. To do this, we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there is many."

The Circuit Court, upon final hearing, rendered a decree in favor of McMullen for \$52,519.80, and one-half of the assets, consisting of plant and tools, furniture, and camp fixtures, of the cost value of \$7,856.76, and a disallowed claim against the city of Portland for \$16,961.25. From this decree Hoffman appeals. There is also a cross appeal taken by McMullen from the decree of the Court allowing Hoffman a salary of \$1,000 per month, and from the refusal of the court to allow him interest on the money found due, and refusal to allow him costs. The appeal of Hoffman will first be considered.

The contention of appellant is that the manner in which the parties hereto presented their bids, and sought thereby to procure contracts from the committee, was illegal. It is not seriously denied but what the city of Portland could have success-
[863] fully defended any action that might have been brought against it by the contractors, Hoffman & Bates, upon the ground that the contract was secured by illegal means. It did not do so. It paid the money to Hoffman. The question here presented is: Can the defendant avail himself of this defense? The authorities answer this question in the affirmative. It is true that the objection that a contract was immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. But it is not for his sake that the objection is ever allowed. The refusal of courts to enforce such contracts is always founded in general principles of public policy, which the defendant may take the advantage of, contrary to the real justice of the case, as between the parties

plaintiff and defendant. It is the duty of all Courts to keep their eye steadily upon the interests of the public and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance in foro civili.

In dealing with illegal contracts, Courts do not and cannot look alone to those who are parties to the illegal transaction. The law regards the welfare of society as paramount, and, in enforcing the law, courts will not impair its efficacy or cripple its operations by considerations affecting the interests of those who are *particeps criminis*. The principle of public policy is this: "*Ex dolo malo non oritur actio.*" No Court will lend its aid to a man who founds his cause of action upon im-

[854] moral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa* or a transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground that the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was bringing his action against the plaintiff, the latter would have the advantage of it; for, where both are equally at fault, *potior est conditio defendentis*. (*Bartle v. Coleman*, 4 Pet. 184, 189; *Tool Co. v. Norris*, 2 Wall. 45, 54; *McCausland v. Ralston*, 12 Nev. 195, 206, et seq., and authorities there cited; *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 418, 427, 3 Fed. 1; *Buck v. Albee*, 26 Vt. 184; *Hannah v. Fife*, 27 Mich. 172, 181; *Wooden v. Shotwell*, 23 N. J. Law, 465; *Price v. Polluck*, 37 N. J. Law, 44; *Belding v. Pitken*, 2 Caines, 147; *Leonard v. Poole*, 114 N. Y. 271, 379, 21 N. E. 707; *Hope v. Association* (N. J. Err. & App.) 34 Atl. 1070.)

In *Bartle v. Coleman* the Court said:

[855] "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other or to

equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws."

A contract to prevent competition and bidding for public work is contrary to public policy, and cannot be enforced. The rule is universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principle of sound public policy, and are void. (*Gulick v. Ward*, 10 N. J. Law, 87, 91; *Swan v. Chorpennig*, 20 Cal. 182, 185; *Hannah v. Fife*, 27 Mich. 172, 180; *Weld v. Lancaster*, 56 Me. 453, 457; *Noyes v. Day*, 14 Vt. 384; *Gibbs v. Smith*, 115 Mass. 592; *Doolin v. Ward*, 6 Johns, 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *Kelly v. Devlin*, 58 How. Prac. 487; *Atcheson v. Mallon*, 43 N. Y. 147; *Hunter v. Pfeiffer*, 108 Ind. 197, 200, 9 N. E. 124; *King v. Winants*, 71 N. C. 469, 474; *Durfee v. Moran*, 57 Mo. 374, 379; *Lawnin v. Bradley*, 13 Mo. App. 361; *Engelman v. Skrainka*, 14 Mo. App. 438; *Woodruff v. Berry*, 40 Ark. 252, 267; *Hyer v. Traction Co.*, 80 Fed. 839, 844.) Do the facts and circumstances of this case bring it within this general rule? Can this case, consistently (356) with the reasoning of the authorities, be excepted from it? Does it infringe in any manner upon any principle of public policy? It is argued by appellee that the bidding was not illegal, because the proof shows that McMullen and Hoffman were jointly interested in the bid, and that the law allows two or more persons to combine together for the purpose of making one bid. This is true where no fraudulent purpose is involved. An honest co-operation between two or more persons to accomplish an object which neither could gain if acting alone in his individual capacity is not within the rule, although, in a certain sense and to a limited degree, such co-operation might have a tendency to lessen competition. There may be a competition that saves as well as a competition that kills. The amount of work to be performed, the necessity of obtaining means to properly carry on the contract, the responsibility of the parties, their ability to complete the work, etc., are matters which are liable to make it absolutely necessary for rival contractors to combine their forces and unite together not only in order to secure the contract, but to enable them, if it is obtained, to complete it without financial embarrass-

ments or other difficulties which are liable to arise in cases of individual responsibility. There is no valid objection to such voluntary combinations if the joint action of the parties is done honestly and in good faith. In all contracts secured in such a manner the Courts should never hesitate to protect parties in their agreements with each other, and compel them to [857] comply with the terms thereof. It is only where the facts and circumstances surrounding the case clearly show that illegal means or improper and deceptive influences and methods were used to procure the contract that the maxim, "*in pari delicto*," applies.

In *Atcheson v. Mallon*, 43 N. Y. 147, 151, the court said:

"A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk as well as the profit is joint and openly assumed. The public may obtain, at least, the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

In *Gibbs v. Smith*, 115 Mass. 592, the Court, in drawing the line of distinction in an analogous case, said:

"An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character, and will be enforced; but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy, and in fraud of the just rights of the parties offering it, and therefore illegal."

See, also, *Lawnin v. Bradley*, *supra*; *Cocks v. Izard*, 7 Wall. [858] 559.

The fraud, if any, in the present case was in withholding the truth—in fraudulently representing and holding themselves out to the committee and to the public as rival bidders, when

in fact they were not. The learned Judge who tried this case, in his opinion upon the exceptions to the defendant's answer, said:

"When the parties presented themselves as competitors for the work, they were guilty of a fraud. The tendency of what was thus done was to cause the water committee to believe that the bid of defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that, in plaintiff's opinion, the work could not be profitably done for less than a figure \$35,000 higher than that bid by defendant, although, as a matter of fact, plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it, for an amount \$75,000 less than that at which the contract was let. Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case." *McMullen v. Hoffman*, 69 Fed. 509, 518.)

Upon the final hearing, he came to the conclusion that his former opinion was erroneous, and held that the contract and
[359] agreement of the parties were valid as between themselves. (*McMullen v. Hoffman*, 75 Fed. 547.)

This case, in principle, cannot, in our opinion, be distinguished from *Atcheson v. Mallon*, *supra*, although the facts here as to the illegal character of the transaction are much stronger than in that case. There the parties simply showed each other their bids, and agreed to divide the profits. Mallon was the lowest bidder, and obtained the contract. The money due on the contract when completed was paid to him. The profits amounted to \$400. Mallon refused to divide. Atcheson brought suit to recover his share of the profits. The Court refused to enforce the contract. After announcing the general rule which we have stated, and declaring the general principles applicable thereto, the court said:

"If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but because its effect was to remove

Atcheson from the number of earnest bidders, and thus, by lessening competition, to detriment the public. And the agreement which was made, laying open to Mallon just what was the judgment of Atcheson of a profitable bid, and removing, in effect, an interested rival, tended to affect Mallon's action; while Atcheson, confident that, if Mallon succeeded, it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce."

[860] Nor can this case be distinguished in principle from *Swan v. Chorpennig*, supra. In that case both parties to the agreement were mail contractors. Swan put in a bid for carrying the mail over a certain route, and agreed with C. to withdraw his bid, and use his influence to induce the government to give to C. a contract for a longer route, including the one bid upon, on consideration that, if C. obtained the contract, S. should have an interest in it, or be paid an equivalent pecuniary compensation. Chorpennig obtained the contract, and, after payment to him, refused to divide the profits. The Court, after quoting *Gulick v. Ward*, said:

"We see no difference in principle between the question in that case and the one now presented, and the cases clearly fall within the same category. In respect to the consideration, it is impossible to distinguish them; for an agreement not to bid and an agreement to withdraw a bid already put in are certainly obnoxious to the same legal objections."

Now, the agreement in the present case was substantially to the same effect. In consideration of sharing in the profits, McMullen did not put in an honest bid. He put in a bid much higher than he would otherwise have done but for the agreement. His object, evidently, was to deceive the committee—to convey the idea that he was a rival bidder, when in fact he was not. Such conduct certainly tended to destroy competition, and to preclude the advantages which inevitably resulted from it. Equally strong in its similarity as to the effect of the agreement between the bidders is the case of *Hannah v. Fife*. [861] That was an action brought by Fife and Haviland against the plaintiff in error, as the sureties of one Oscar L. Noble in a contract between said Noble and Fife and Haviland, by which

Noble agreed to enter into and perform a contract with the state for the construction of a swamp land state road, for the building of which said Fife and Haviland had been the lowest bidders, and to give them, as a bonus for being allowed to take their place in the contract, eight sections of swamp lands to be received from the state for the performance of the work. Noble's bid, in the first instance, was in reality less than the bid of Fife and Haviland, but it was not made out in accordance with the plan submitted by the state, and could not be accepted. The bidders obtained a continuance and, before the bid was let, the agreement in question was made, and Noble got the contract. The Court in the discussion of the case, said:

"Now, if these bidders, Noble, on one side, and Fife and Haviland on the other, had, before or at the time of making their respective bids, entered into a secret agreement, for their mutual profit and to avoid competition with each other, that, for the purpose of getting a contract from the state for building this road at the highest rate or greatest quantity of land allowed by the law, only one of the parties should put in a bid, which in its terms would accord with the plan of the road adopted by the state, and with the notice given, while the other, though not in accordance with that plan or notice, should in all other respects appear to be in accordance with the terms proposed by the state, and better in some respects than the bid of the other, but which, nevertheless, could not be accepted, because not in accordance with the plan (thus securing in advance the letting of the contract to one of the parties without danger of competition from the other, while keeping up the appearance of competition); and that the contract should be performed by one of the parties for the mutual profit of both; or that the party taking the contract and doing the work should give to the other as his share of profit, eight sections or any other portion of the land to be received from the state—if such had been the previous arrangement between the parties, it will not be pretended that such an understanding or any agreement resting upon it or calculated to carry it into effect, could have been sustained. It would have been so manifestly fraudulent, as against the state, and so subversive

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of the intentions and objects of the legislation, that no court could hesitate for a moment to declare it illegal and void."

There was no evidence in that case except such as could be legally drawn from the facts that there was any such previous agreement. But the Court said it was difficult to resist the conclusion that the facts as proved tended "pretty strongly to show the existence of some such previous understanding," and that the putting in the bid "by Noble in a mode which, under the notice, could not have been accepted, is not, when considered with reference to the subsequent acts of the parties, easily explained upon any other rational theory than that of previous concert for the purpose already intimated." The Court further said:

"But whether there was, in fact, any such secret understanding or fraudulent collusion between the bidders or not, is, in my opinion, entirely immaterial to the decision in the present case. It seems to me clear that the tendency of all such contracts between bidders as that here in question, if recognized as valid by the courts, must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder."

[863] In the present case it is evident that McMullen and Hoffman understood each other; that their intention was to prevent open competition, which the law encourages. In their confederacy they were aiming at the same result—that of compelling the city to pay a higher price for the work than McMullen believed it was worth.

Breslin v. Brown, 24 Ohio St. 565, 570, is perhaps the strongest case presented in favor of appellee herein as to the right of parties who had intended to bid, and did bid, upon public improvements that were to be let to the lowest bidder, to enter into an agreement to become partners in the work in the event that the contract should be awarded to either, and that the contract, when awarded, should inure to the benefit of the firm. But that case, in its facts, is clearly distinguishable from the case at bar in many of its essential particulars. There, separate and independent bids were filed by the respective parties.

"The bid of each was based upon his own judgment and filed at his own discretion." It did not appear that either had knowledge of the other's bid, and these facts led the Court to the conclusion that the agreement made between the parties, and the result of the bidding, did not have a tendency to stifle competition at the letting of the bid. Here the parties agreed in advance as to what their bids were to be. Each knew what the bid of the other was. The intent, object, and tendency of their co-operation in the contract, as is fully and clearly shown by the testimony, was to deceive the committee, and commit a fraud upon the public.

864] In *Hunter v. Pfeiffer* the appellant and the appellee were about to bid for the construction of a public work, but the appellant was induced to withhold his bid in consideration that he should be taken into partnership, and be permitted to share in the profits of any contract which appellee might secure. The Court said:

"Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of the profits anticipated or accrued. . . . If the Court should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is present, the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest and best bidder."

At the close of the opinion the Court said:

"If, in letting a contract such as this, parties, without knowledge of the bids of each other, submit their bids as the law requires, and afterwards enter into a partnership for the construction of the work with the knowledge of the officers letting the same, a question of a different character is presented. Such a transaction bears some similitude to the contract which 865] was upheld in *Breslin v. Brown*, 24 Ohio St. 565, a case which, on account of the liberal view taken of the contract there involved, is not universally indorsed. That case, however, affords no aid to the appellant here."

The cases are too numerous to be specifically reviewed. The dividing line is always sharply drawn with reference to the

particular facts of each case, and the conclusion reached that where the parties have acted openly and honestly, and entered into an agreement which neither in its purpose, effect, nor natural tendency is to prevent a fair competition, it can be and should be enforced. But, where there is a secret combination—call it partnership or any other name—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be and is condemned, as violative of public policy, and held to be absolutely void. All the authorities hold that, where either the intention, the effect, or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when discovered, will be stamped with marks of disapproval in any court of law or of equity. Were any of the subsequent acts of the parties, or the condition of the contract as to its completion, or any other fact or circumstance established at the trial, of such a character as to take this case out of or away from the general rule hereinbefore stated in relation to illegal contracts?

[866] It is claimed that, before the money was paid by the city, it had knowledge of the true relations existing between McMullen and Hoffman, and, with such knowledge, accepted the work, and paid the contract price therefor, and that the city was not in any manner injured by the illegal acts of the plaintiff and defendant herein. But the law is well settled that the question of the validity of the contract does not depend upon the circumstances whether the public has, in fact, suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose they must have contemplated when it was made. Its validity is tested, not by its results, but by its objects, as shown by its terms. In addition to the authorities heretofore cited, see *Gibbs v. Smith*, 115 Mass. 592; *Atcheson v. Mallon*, 43 N. Y. 147, 149; *Woodworth v. Bennett*, 43 N. Y. 273, 278; *Weld v. Lancaster*, 56 Me. 453, 457; *Richardson v. Crandall*, 48 N. Y. 348, 362. It is not therefore necessary, in the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental or beneficial to the city of Portland.

Appellee argues that the case as presented comes within the rule, so frequently announced in the authorities, that a contract or an agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration, so that the plaintiff will not require the aid of the illegal transaction to make out his case. This principle is undisputed. (*Armstrong v. Bank*, 133 U. S. 434, 469, 10 Sup. Ct. 450, and authorities there cited. See, also, *Woodworth v. Bennett*, 43 N. Y. 273; *Buck v. Albee*, 26 Vt. 184; *Gilliam v. Brown*, 43 Miss. 642, 660; *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 558, 562, 3 Fed. 423; *Swan v. Scott*, 11 Serg. & R. 155; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 208.) This argument, with the authorities cited in its support, will be considered in connection with the further contention of appellee that the case, upon its facts, comes within the general principle that, after the illegal contract has been fully executed, one party, in possession of all the gains and profits resulting from the illicit traffic and transaction, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law. (*McBlair v. Gibbs*, 17 How. 232, 237; *Railroad Co. v. Durant*, 95 U. S. 576, 578; *Sharp v. Taylor*, 22 Eng. Ch. 801, 817; *Gilliam v. Brown*, 43 Miss. 642, 664; *Lestapies v. Ingraham*, 5 Pa. St. 71, 81; *Hipple v. Rice*, 28 Pa. St. 406; *Willson v. Owen*, 30 Mich. 474; *Richardson v. Welch*, 47 Mich. 309, 11 N. W. 172; *Wann v. Kelly*, 2 McCrary, 628, 630, 5 Fed. 584; *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russel*, Id. 296; *Thomson v. Thomson*, 7 Ves. 470; *Owen v. Davis*, 1 Bailey, 315.) There are certain underlying principles—clear and well defined—which govern and control the propositions announced in these authorities; and, from a careful consideration thereof, it can readily be ascertained whether they have or have not any binding force in their application to the facts of this case.

Armstrong v. Bank, supra, may be taken as a representative case under the first proposition. *Armstrong* was the receiver of the Fidelity National Bank of Cincinnati, Ohio. The facts were that on June 14, 1887, the Fidelity National Bank of Cincinnati drew a draft for \$100,000 on the Chemical National Bank of New York City, payable to the order of the American Exchange National Bank of Chicago, and put it into the hands of one W., who delivered it, for value, to K. & Co. They

indorsed it for deposit to their account to the Chicago bank, which credited the amount to them, and paid their checks against it. The Court held that W. did not act as the agent of the Cincinnati bank, and that in a suit by the Chicago bank against the receiver of the Cincinnati bank, which had failed, to recover the amount of the draft, the Chicago bank was a bona fide holder of it for value, and want of consideration could not be shown by the receiver. One defense set up to the suit on the certificate of deposit was that H. (the vice president of the Cincinnati bank), its assistant cashier, and W., of W. & Co., conspired to defraud that bank by using its funds in speculating in wheat in Chicago, through K. & Co., so as to make a "corner" in wheat. The Court held that the plaintiff could not refuse to honor the checks of K. & Co. against the deposit, on the ground that K. & Co. intended to use the money to pay antecedent losses in the gambling wheat transactions; that where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. It was these facts and rulings of the Court that led up to the announcement of the legal principles under consideration. In the discussion of that case the Court said:

"When the plaintiff received the deposit from Kershaw & Co., it was bound to honor their checks against it; and it could not refuse to pay them on the ground that Kershaw & Co. intended to make an improper use of the money. If Wilshire, Eckert & Co. and Kershaw & Co. were engaged in gambling, and the former had deposited money in the Fidelity Bank to be transferred to the plaintiff, in order that Kershaw & Co. might check out the amount from the plaintiff's bank in payment of losses sustained in the gambling transaction, and both banks knew that the money was to be so used, still the Fidelity Bank, having received the deposit, could not refuse to pay it over to the plaintiff, and the plaintiff, having received it, could not refuse to honor the checks of Kershaw & Co. drawn against it."

The Armstrong Case is in line with the early English cases of *Tenant v. Elliott*, *Farmer v. Russell*, *Sharp v. Taylor*, and others heretofore cited, to the effect that A., having received money to the use of B. on an illegal contract between B. and

870] C., shall not be allowed to set up the illegality of the contract as a defense in an action brought by B. for money had and received. The principle of these cases cannot be questioned. But a bare statement of the facts upon which the principles were there applied shows, beyond question, that the facts of the present case are not, and cannot be brought, within the rule there announced. This case belongs to a different class. The distinction between the class of cases is clearly set forth in *Thomson v. Thomson*, *supra*. The master of the rolls, after declaring that the agreement there under consideration was illegal, said:

"There is an equity against the fund, I admit, if you can get at it by a legal agreement. The defense is very dishonest, but in all illegal contracts it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods, and keeps them, but refuses to pay for them. So, in the underwriter's case, an insurance contrary to the act of parliament, the brokers had received the money, and refused to pay it over; and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. *Tenant v. Elliott* is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then, how are you to get at it except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences. Here you cannot stir a step but through the illegal agreement; and it is impossible for the court to enforce it."

871] *Brooks v. Martin*, 2 Wall. 70, is relied upon by appellee to show that the contract and agreement between the parties had been fully executed and completed. There the parties were partners in buying up soldiers' claims, contrary to law. When

the suit was brought, all the claims of the soldiers illegally purchased by the partnership, with money advanced by the complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had in many cases been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the land so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were, then, in the hands of the defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It was to have an account of these funds, and a division of these proceeds, that the suit was brought. Upon this statement of the facts the Court said:

"Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It [872] interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the Court in this case."

In support of these views, the Court quotes in extenso from *Sharp v. Taylor*, *supra*, which closed with the statement that "the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*, and recognized and approved by Sir William Grant in *Thomson v. Thomson*"; thus clearly indicating the class of cases to which the case then under consideration belongs. The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover

is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to recover.

873] The doctrine of *Brooks v. Martin* and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest. If McMullen and Hoffman had agreed to continue their partnership, by investing the profits received by Hoffman under the illegal contract in the purchase of property, mortgages, bonds, or other securities, neither of them would be permitted, as against the other, to set up the fact that the money so invested was derived as profits from an illegal transaction, in which the rights of the public were involved. Numerous instances are found in the books which present the distinction existing between the two lines of cases under consideration in a very clear light.

In *King v. Winants*, the Court, in reviewing the principles announced in *Brooks v. Martin*, 2 Wall. 70, said:

"Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of \$1,000, and then refuses to divide; and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the ren-counter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused. Now, if these robbers had taken the \$1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the Court to settle up that legitimate business, the Court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks v. Martin*, *supra*, so much relied on by plaintiff."

- [874] The learned counsel for appellee, recognizing the force of the reasoning of the authorities, admits, for the purpose of his argument, that if, after the award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him so to do, nor collect any damages for his refusal, "because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in securing the award, and, necessarily counting upon that service, he would have had to bring it into the court, and its character would have been a subject for investigation. But, when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter." If this position could be maintained it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off all rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder—could always be enforced by a simple agreement of partnership by parties guilty of the fraud. The fraud, under this rule, is a thing of the past—has become "a dead letter," or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing the illegal contract. What would there be left to discourage parties in their illegal combinations to defeat the ends of justice if this rule should be adopted and enforced by the Court? The illegality of the contract could always be avoided as between the parties to the partnership agreement. We prefer to tread in the beaten path; to follow the safe road which has al-
- [875] ways been kept clean, in good condition and order, and furnishes a safe method of protection to the public who honestly travel thereon, and provides a penalty to all parties who depart therefrom by crooked ways, which naturally lead and always tend to destroy the public interests. It is manifest to every layman and lawyer, as well as to the courts, that such agreements would destroy all competition in the letting of contracts for public works. In the language of the authorities, such agreements are always declared void. Why? Because men with these agreements in their hands, and relying upon them for gain, do not act towards the public and third

persons as they would without them, under the stimulus of a competing opposition.

This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract. The case could not be proven without first showing the contract, and then proving the amount of money received and expended thereon. If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. (*Hanks v. Baber*, 53 Ill. 292; *Chace v. Trafford*, 116 Mass. 532; 1 Am. & Eng. Enc. Law (2d Ed.) 437.) But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought. This suit, as before stated, [376] is for an accounting, and the amount found due in the Circuit Court was only ascertained, and could only be determined, by an investigation of the transaction between McMullen and Hoffman arising out of the contract with the committee. The relief prayed for required the Court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do. The act of Hoffman in refusing to divide the profits cannot be too strongly condemned. But it has often been said that courts are not organized to enforce the saying that there is honor among wrongdoers, and the desire to punish the man that fails to observe this rule must not lead the court to a decision that such persons are entitled to the aid of Courts to adjust their differences arising out of, and requiring an investigation of, their illegal transactions.

The conclusions reached upon this branch of the case render it unnecessary to consider the question argued by counsel as

Julia E. Hoffman, Executrix, etc.

to whether or not the partnership between Hoffman and McMullen was dissolved long prior to the completion of the contract, or to examine any of the questions presented in the cross appeal by McMullen against Hoffman. The views herein expressed are decisive of the whole case. The judgment and decree of the Circuit Court are reversed.

[Endorsed]: Opinion. Filed Oct. 4, 1897. F. D. Monckton, Clerk.

[877] *United States Circuit Court of Appeals, for the Ninth Circuit.*

No. 334. October Term, 1897.

JULIA E. HOFFMAN, Executrix, etc. }

Appellant, }

vs. }

JOHN McMULLEN, }

Appellee. }

JOHN McMULLEN, }

Appellant. }

vs. }

JULIA E. HOFFMAN, Executrix, etc. }

Appellee. }

Decree.

Appeal from the Circuit Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Oregon, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said Circuit Court, in this cause be, and the same is hereby, reversed, with costs.

[Endorsed]: Decree. Filed Oct. 4, 1897. F. D. Monckton, Clerk.

[878] *United States Circuit Court of Appeals for the Ninth Circuit.*

JULIA E. HOFFMAN, Executrix, etc.,
Appellant.

vs.

JOHN McMULLEN,

Appellee.

JOHN McMULLEN,

Appellant.

vs.

JULIA E. HOFFMAN, Executrix, etc.,
Appellee.

No. 334.

Clerk's Certificate to Record in U. S. Circuit Court of Appeals.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eight hundred and seventy-seven pages, numbered from one to eight hundred and seventy-seven, both inclusive (contained in two volumes) to be a copy of the entire record in the above-entitled case in the said United States Circuit Court of Appeals, as the originals thereof remain and appear of record in my office.

Attest my hand and the seal of said United States Circuit Court of Appeals at San Francisco, California, this 14th day of March, A. D. 1898.

[Seal]

F. D. MONCKTON, Clerk.

[879] At a stated term, to-wit, the October term, A. D. 1897, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the city and county of San Francisco, on Monday, the twenty-eighth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

JULIA E. HOFFMAN, Executrix, etc.,
Appellant,

vs.

JOHN McMULLEN,

Appellee.

JOHN McMULLEN,

Appellant.

vs.

JULIA E. HOFFMAN, Executrix, etc.,
Appellee.

No. 334.

Order Denying Petition for Rehearing.

It is ordered that the petition for a rehearing heretofore filed herein be, and the same is hereby, denied.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within entitled cause.

Attest my hand and the seal of said Circuit Court of Appeals this 14th day of March, A. D., 1898.

[Seal]

F. D. MONCKTON, Clerk.

880 UNITED STATES OF AMERICA, ss :

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, is appellant and John McMullen is appellee, and John McMullen is appellant and Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased, is appellee, which suit was removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the district of Oregon, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme

881 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

882 [Endorsed:] Dock. No. 334. Supreme Court of the United States, October term, 1897. No. 622. John McMullen vs. Julia E. Hoffman, executrix, &c. Writ of certiorari. Filed May 21, 1898. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

883 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN McMULLEN, Petitioner,

v.

JULIA E. HOFFMAN, Executrix of the Last Will and Testament
of Lee Hoffman, Deceased, Respondent.

It is hereby stipulated and agreed between the parties to the above-entitled cause that the certified transcript of the record on file in the Supreme Court of the United States in the matter of the petition of the above-named John McMullen for a writ of certiorari, addressed to the above-entitled United States circuit court of appeals for the ninth circuit, commanding said court to certify up to the Supreme Court of the United States the record in the causes and cross-appeals of Julia E. Hoffman, executrix of the last will and

testament of Lee Hoffman, deceased, appellant, *vs.* John McMullen, and John McMullen, appellant, against Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased, from the circuit court of the United States for the district of Oregon, may be used upon the trial and hearing of this cause in the Supreme Court of the United States with like force and effect as though said transcript had been certified up at large by the clerk of the said United States circuit court of appeals for the ninth circuit in obedience to the writ of certiorari which has been allowed herein by the Supreme Court of the United States, and the clerk of the said United States circuit court of appeals may as a return to said writ of certiorari certify and transmit to the Supreme Court of the United States a transcript of this stipulation in lieu of a transcript of the record at large.

L. B. COX,
Of Counsel for Petitioner.
 RUFUS MALLORY,
Of Counsel for Respondent.

Dated this 18th day of May, 1898.

(Endorsed :) Stipulation. Filed May 21, 1898. F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing stipulation to be a full, true, and correct copy of a stipulation entered into between the respective parties relative to the return to the writ of certiorari herein as the original thereof remains of record in my office.

Attest my hand and the seal of said
 Seal United States Circuit United States circuit court of appeals for
 Court of Appeals, Ninth the ninth circuit, at San Francisco, Cal-
 Circuit. ifornia, this 23rd day of May, A. D. 1898.
 F. D. MONCKTON, *Clerk.*

885 United States Circuit Court of Appeals for the Ninth Circuit

JULIA E. HOFFMAN, Executrix, etc., Appellant,	}	No. 334.
<i>v.</i>		
JOHN McMULLEN, Appellee,		
and		
JOHN McMULLEN, Appellant,		
<i>v.</i>		
JULIA E. HOFFMAN, Executrix, etc., Appellee.		

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court

of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-entitled cause, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 18th day of May, A. D. 1898, the original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

Attést my hand and the seal of said
Seal United States Circuit United States circuit court of appeals for
Court of Appeals, Ninth the ninth circuit, at San Francisco, Cal-
Circuit. ifornia, this 23rd day of May, A. D. 1898.
F. D. MONCKTON, *Clerk*.

886 [Endorsed:] Case No. 16,835. Supreme Court U. S., Octo-
ber term, 1898. Term No., 271. John McMullen, petitioner,
vs. Julia E. Hoffman, executrix, &c. Writ of certiorari and return.
Filed June 6, 1898.